THE PRAGMATIC COURT: REINTERPRETING THE SUPREME PEOPLE'S COURT OF CHINA

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Abstract

This Article examines the institutional motivations that underlie several major developments in the Supreme People's Court of China's recent policy-making. Since 2007, the SPC has sent off a collection of policy signals that escapes sweeping ideological labeling: it has publically embraced a populist view of legal reform by encouraging the use of mediation in dispute resolution and popular participation in judicial policy-making, while continuing to advocate legal professionalization as a long-term policy objective. It has also eagerly attempted to enhance its own institutional competence by promoting judicial efficiency, simplifying key areas of civil law, and expanding its control over lower court adjudication. This Article argues that the strongest institutional motivation underlying this complex pattern of activity is, contrary to some common assumptions, neither simple obedience to the Party leadership nor internalized belief in some legal reform ideology, whether legal professionalism or populism. Instead, it is the pragmatic strengthening of the SPC's own financial security and sociopolitical status—the SPC is, in many ways, a "rational actor" that pursues its institutional self-interest. This theory of "institutional pragmatism" brings unique analytical cohesion to the SPC's recent behavior, giving us a clearer sense of its current priorities and, perhaps, its future outlook.

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INTRODUCTION

Within Western scholarship on contemporary Chinese law, the Supreme People's Court of China ("SPC") is paradoxically both omnipresent yet curiously ignored. Given its status as the highest court in China, few articles on Chinese legal development can afford to ignore it.[1] The institutional motivations behind the SPC's doctrinal and policy decision-making, however, remain largely unknown: scholars have studied, in considerable detail, *how* the SPC acts,[2] but rarely *why*.[3] Secrecy certainly shrouds SPC decision-making, but secrecy is true of the entire Chinese Party-state. Yet, there is no lack of voluminous studies on the intentions of the Chinese Communist Party's leadership.[4] A close study of the SPC's institutional motivations is especially necessary as the Chinese judiciary enters a new era of ideological uncertainty and tension, in which potentially contradictory ideals of legal reform sit side by side in the SPC's work agenda, hinting at highly complex considerations that lie beyond the rhetorical surface.

This is such a study. It argues that the strongest motivation underlying much of the SPC's recent activity is, contrary to common assumptions, neither obedience to Party leadership nor implementation of any legal reform ideology—whether legal professionalism or some competing principle—but

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[1] Articles that focus on certain subject matters, such as legislation or the public security apparatus, tend to make less mention of the SPC. *See, e.g.*, Donald C. Clarke, *Legislating for a Market Economy in China*, *in* CHINA'S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 13 (Donald C. Clarke ed., China Quarterly Special Issues, New Ser. No. 8, 2008) [hereinafter CHINA'S LEGAL SYSTEM]; Murray Scot Tanner & Eric Green, *Principals and Secret Agents: Central versus Local Control Over Policing and Obstacles to "Rule of Law" in China*, *in* CHINA'S LEGAL SYSTEM 90.

[2] The most systematic survey remains Susan Finder, *The Supreme People 's Court of the People's Republic of China*, 7 J. CHINESE L. 145 (1993). A more recent overview that also covers the entire Chinese judiciary can be found at RANDALL PEERENBOOM, CHINA'S *LONG MARCH* TOWARD RULE OF LAW 280–330 (2002). An excellent survey of post-2007 changes in SPC doctrine is Benjamin Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, *in* MAO'S INVISIBLE HAND 165 (Sebastian Heilmann & Elizabeth Perry eds., 2011).

[3] Certainly a few papers have discussed this issue, but even those analyses tend to be brief and somewhat speculative, rarely occupying a prominent place in the paper. *See* discussion *infra* pp. 22–24. Some scholars have discussed in considerable detail the institutional motivations of lower courts, but not the SPC. *See, e.g.*, Nicholas C. Howson, *Corporate Law in the Shanghai People's Courts, 1992–2008: Judicial Autonomy in a Contemporary Authoritarian State*, 5 E. ASIA L. REV. 330 (2010).

[4] Recent works include RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS (2010); THE CHINESE PARTY-STATE IN THE 21ST CENTURY: ADAPTATION AND THE REINVENTION OF LEGITIMACY (Andre Laliberte & Marc Lanteigne eds., 2008); RODERICK MACFARQUHAR, THE POLITICS OF CHINA (2004). For a detailed discussion of the Party-state's recent legal reform agenda, see Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011).

the pragmatic strengthening of its own financial security and sociopolitical status. This theory of "institutional pragmatism" brings unique analytical cohesion to the complicated, even contradictory, policy signals the SPC has sent off in recent years, giving us a clearer sense of its current priorities and, perhaps, its future outlook.

Despite enormous political and institutional constraints,[5] the Chinese judiciary seemed to be slowly advancing, as recently as 2007, towards greater judicial independence, legal professionalization, and perhaps even some power of constitutional review.[6] Scholars fiercely debated the merits and future potential of these developments,[7] but most agreed that the developments

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[5] Virtually no study of the Chinese judiciary fails to mention these. *See, e.g.*, Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 21–29 (2007); PEERENBOOM, *supra* note 2, at 298–316; Finder, *supra* note 2, at 148–59.

[6] For a guardedly optimistic overview of Chinese legal development up to 2000, see PEERENBOOM, *supra* note 2, at 282, 318–22 (2002). Discussing the 1995 to 2005 period, Liebman points out that development towards legal professionalism and the rule of law has been "restricted," but also notes that at least some significant progress was being made, often through the initiatives of lower courts. Liebman, *supra* note 5. Likewise, Fu Hualing and Richard Cullen argue that, prior to 2005, the judiciary was on the path towards greater judicial professionalism and "adjudicative" justice, although they also note that, due to Party interference, some of those trends were being challenged during the later Xiao Yang years. Hualing Fu & Richard Cullen, *From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China, in* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 25 (Margaret Y. K. Woo ed., 2011). Mainland Chinese scholars have argued that the Chinese judiciary actually deserves a more "positive assessment." Shen Kui, *Commentary on "China's Courts: Restricted Reforms", in* CHINA'S LEGAL SYSTEM, *supra* note 1, at 85, 89. *See also*, Jonas Grimheden, *The Reform Path of the Chinese Judiciary*, 30 FORDHAM INT'L L.J. 1000 (2007) ("The reform process of the Chinese judiciary . . . is impressive. . . . [It] has been making headway towards enhanced professionalism, stature and independence."). Other American scholars point out that the Chinese Party-state has clearly promoted the rule of law for much of the past decade, but primarily as a tool to enhance its own legitimacy. *See* Keith Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TRANSNAT'L L. 114, 116 (2006). Liebman would agree that the "[p]rofessionalization of legal actors and institutions is perhaps the single most significant accomplishment of China's legal reforms." Liebman, *supra* note 2, at 7.

[7] Most western scholars would agree that the trend towards legal professionalism and the rule of law is positive, but not nearly strong enough. *See, e.g.*, Liebman, *supra* note 5, at 41–44; Clarke, *supra* note 1; Grimheden, *supra* note 6. Mainland Chinese scholars, most famously Zhu Suli, have sometimes been critical of these assessments. *See* Su Li (苏力), Song Fa Xiaxiang: Zhongguo Jiceng Sifa Zhidu Yanjiu (送法下乡：中国基层司法制度研究) [SENDING LAW DOWN TO THE COUNTRYSIDE: A STUDY OF LOCAL JUDICIAL INSTITUTIONS IN CHINA] (2000). *See also* Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 L. & SOC. INQUIRY 75 (2006) (providing empirical evidence to suggest that legal professionalization initiatives have limited effect on local courts). Other Chinese scholars have been more receptive to legal professionalism ideals. *See, e.g.*, He Weifang (贺卫方), Zhongguo Sifa Guanli Zhidu de

themselves were real. If the judiciary remained a "bird in a cage,"[8] to borrow Stanley Lubman's famous metaphor, then at least the cage was expanding.

2008, however, threatened to shatter such optimism. In March, the National People's Congress appointed Wang Shengjun to replace the retiring Xiao Yang as SPC president. The "parachuting" of a party bureaucrat with no legal education or court experience into the nation's top judicial post suggested that the Party-state wished to impose closer political control over the judiciary.[9] In a series of speeches made soon after his appointment, Wang argued that courts should follow the "Three Supremes": the supremacy of the Party, the supremacy of popular interests, and the supremacy of the constitution and law.[10] Dismayed legal scholars noted that that the list placed Party and popular interests ahead of the constitution and law, and that Party interest was the "First Supreme."[11]

Liang Ge Wenti (中国司法管理制度的两个问题) [*Two Problems in China's System of Judicial Administration*], Zhongguo Shehui Faxue (中国社会科学) [SOC. SCI. CHINA], no. 6, 1997, at 116, *available at* http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=371; Xu Aiguo (徐爱国), Wei Fazhi er Douzheng—Xi Su Li de "Fazhi ji Bentu Zhiyuan" (为法治而斗争—析苏力的《法治及本土资源》) [*The Struggle for the Rule of Law: An Analysis of Su Li's* "The Rule of Law and Native Resources"], *in* 1 Beida Faxue Wencun (北大法学文存) [PEKING UNIVERSITY LAW ANTHOLOGY] 274 (Beijing Daxue Faxueyuan [北京大学法学院] [Peking Univ. Law Sch.] ed., 2002), *available at* http://www.law-star.com/cacnew/200902/235029752.htm.

[8] STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999).

[9] *See, e.g.*, Wang Liping (王利平), Sifa Gaige Wulu Ketui (司法改革无路可退) [*There is No Way Back for Judicial Reform*], He Weifang de Bolaoge (贺卫方的博嘮閣) [HE WEIFANG'S BLOG] (Sept. 5, 2008, 11:54 PM), http://blog.sina.com.cn/s/blog_488663200100awek.html; Long Fu (龙夫), Cong "Xiao Yang" dao "Wang Shengjun", Kan Zhongguo Sifa Gaige Hequ Hecong (从"肖扬"到"王胜俊"，看中国司法改革何去何从) [*Gauging the Future of Chinese Legal Reform from the Transition: From Xiao Yang to Wang Shengjun*], Falü Buluo de blog (法律部落的 blog) [LEGAL TRIBE'S BLOG] (Nov. 18, 2008, 6:32 PM), http://for105.fyfz.cn/art/407195.htm.

[10] Wang Shengjun (王胜俊), Gaoju Qizhi Yushi Jujin Nuli Kaichuang Renmin Fayuan Gongzuo Xinjumian (高举旗帜 与时俱进 努力开创人民法院工作新局面) [*Raise High the Flag and Vigorously Establish a New Situation in the Work of People's Courts*], Zhongguo Fayuan Wang (中国法院网) [CHINA COURTS NET] (Aug. 7, 2008, 9:16 AM), http://www.chinacourt.org/public/detail.php?id=316078. This concept had actually made its debut in late 2007 speeches by Party Secretary Hu Jintao, but it was Wang's vigorous advocacy that alerted the Chinese legal world to its potential ramifications for judicial reform.

[11] He Weifang (贺卫方), San Ge Zhishang Sui Zhishang? (三个至上谁至上?) [*Which of the "Three Supremes" is Supreme?*], He Weifang de Bolaoge (贺卫方的博嘮閣) [HE WEIFANG'S BLOG] (Aug. 27, 2008, 4:54 PM), http://blog.sina.com.cn/s/blog_488663200100atga.html.

The "Second Supreme," the supremacy of popular interests, has also had a powerful effect on SPC policy. Since 2008, scholars have commented on the reincarnation of "populism"—defined broadly as promoting judicial responsiveness to and incorporation of public opinion, and often tied to non-adjudicatory methods of dispute resolution—as a guiding SPC doctrine.[12] The SPC's advocacy of this doctrine actually began in the later Xiao Yang era, but few would dispute that such advocacy has intensified after Wang's appointment. The doctrine has led to, most prominently, stronger emphasis on mediation as a favored dispute resolution method and higher sensitivity towards popular opinion. Much of this agenda seems to push in the opposite direction of legal formality, professionalism, and judicial independence.

There is, however, no indication that the SPC has given up on these latter ideals. Quite the opposite, they remain firmly on the SPC's list of guiding principles, side by side with the promotion of populism. At the very least, the "supremacy of the constitution and laws" remains the "Third Supreme."[13] The SPC continues to emphasize the need for objective, independent, and doctrinally consistent judicial decision-making by professionally trained judges. As Benjamin Liebman acutely points out in a recent paper, the Chinese judiciary, starting with the SPC, is now characterized by "tension between trends toward professionalism and populism."[14]

What institutional motivations drive the SPC's recent "populist turn?" One fairly popular approach is to see the SPC as essentially a loyal footsoldier of the Party leadership: it is simply implementing a broader "turn against law" that the leadership asks of the entire law enforcement apparatus.[15] Because it is just carrying out orders and therefore lacks substantive agency in judicial policy-

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[12] Liebman, *supra* note 2, at 11, provides a basic description of "legal populism":

> The Ma Xiwu method embodied core elements of the CCP's legal ideology. Law became inseparable from politics and was designed to advance Party policy. Law was practical and adaptable, not rigid or constraining. Legal institutions were neither independent nor specialized, and professionalism was explicitly rejected. Written law yielded to actual experiences; a correct decision was one that met the emotions of the masses.

For other discussions of the recent "populist turn" in Chinese legal reform, see Minzner, *supra* note 4; Zang Dongsheng, *Rise of Political Populism and the Trouble with the Legal Profession in China*, 6 HARV. CHINA REV. 79 (2010); Randall Peerenboom, *Between Global Norms and Domestic Realities: Judicial Reforms in China*, 2010 LAWASIA J. 1; Eva Pils, *Yang Jia and China's Unpopular Criminal Justice System*, CHINA RTS. F., Mar. 2009, at 59, *available at* http://hrichina.org/public/PDFs/CRF.1.2009/CRF-2009-1_Pils.pdf (discussing the SPC's embracement of populism under Wang Shengjun).

[13] Wang, *supra* note 10.

[14] Liebman, *supra* note 2, at 1, 7.

[15] *See* Minzner, *supra* note 4; Fu & Cullen, *supra* note 6, at 54-66 (discussing how the Party leadership pressured the judiciary to move away from "adjudicative justice"); Zang, *supra* note 12.

making, there is no pressing need to analyze the SPC's own institutional motivations. This is undoubtedly true to some extent. Indeed, we know well the political and institutional constraints that the judiciary faces, which the recent advent of "the supremacy of the Party" only reemphasizes.

Nevertheless, it would be a serious exaggeration to assume that these constraints and pressures leave no room at all for the SPC or other courts to develop and implement a "mind of their own." The gradual development of legal professionalism over the past decade has undoubtedly increased the judiciary's overall functional independence, if only because legal matters have become more complicated.[16] Many acknowledge that the legal system is not merely "a passive participant in the reform process,"[17] and that the SPC in particular is capable of considerable "activism."[18] While these observations are not fundamentally inconsistent with the basic presumption of Party control, they do highlight the need to take the SPC's own interests and intentions more seriously. Directives from the Party leadership may well establish basic parameters for SPC activity, but the technical complexity of the Chinese judiciary will usually create considerable room for maneuvering within those parameters. As the empirical evidence below repeatedly suggests, the SPC does possess substantive agency in determining China's legal reform agenda.

If so, how should we interpret the SPC's recent endorsement of legal populism? The technical complexity of reform measures under this rhetorical umbrella suggests that something more than simple-minded adherence to higher policy directives is at work here.[19] One possible approach is to take the SPC at its word: if it claims to believe in populist ideals, then perhaps it actually does. One can certainly point to significant continuities between the SPC's recent populist rhetoric and dispute resolution practices from the Party's earlier years, suggesting that there really is a genuine "Chinese socialist tradition" of populist lawmaking.[20] It would not be surprising, therefore, if the SPC leadership had internalized significant elements of this tradition, which then came into conflict with its partial internalization of legal professionalism ideals. In this view, the "tension between trends toward professionalism and populism" is ideologically genuine.

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[16] *See* discussion *supra* note 6.

[17] Liebman, *supra* note 2, at 3.

[18] Finder, *supra* note 2, at 223–24. The SPC has actually drawn criticism for its "dangerous activism," and for overstepping its constitutional boundaries. *See infra* notes 57, 58, 206 and 207.

[19] *See* discussion *infra* Part III. *See also*, Liebman, *supra* note 2, at 24 ("Efforts to position the current work of the courts as consistent with revolutionary traditions may in significant part consist of using revolutionary language to pursue divergent and diffuse goals.").

[20] *See* Liebman, *supra* note 2, at 13–15, 16 ("Most aspects of the modern *sifa weimin* movement trace their roots to Ma Xiwu.").

This approach encounters empirical difficulties, however, when we place the SPC's populist rhetoric within a broader context of recent judicial developments. Despite the rhetorical emphasis placed on populism and professionalism, some key developments in recent SPC doctrine and policy do not easily relate to either trend, or even to the Party-state's increased control over the judiciary. For example, the SPC has shown increasing interest in a "cost and efficiency" (成本与效率) (*chengben yu xiaolü*) approach towards trial procedure and caseload management that has potentially enormous ramifications for civil and administrative adjudication. The most significant measures in this agenda, which encourage judges to coercively apply summary procedure to civil cases, actually contradict *both* ideological frameworks and show no clear relation to external political pressure.[21] Likewise, a controversial draft interpretation of the Marriage Law, which drastically cuts down on the scope of marital property, does not logically derive from any ideological stance, but instead suggests a straightforward desire to simplify civil adjudication and a deep concern for the potential overextension of judicial resources.[22] The strength of this concern, also seen in the "cost and efficiency" reforms, seems disproportionate to any outright political pressure the SPC might have faced, any actual financial shortages, or any noticeable deficiency in case-processing speeds. It instead reflects a strategic concern for the judiciary's longer-term financial health under uncertain political conditions. And with the recent establishment of a "guiding cases" system, which gives stare decisis-like authority to select cases, the SPC has strengthened its powers of judicial interpretation, albeit in a careful and low-key fashion that avoids the wrath of other government branches or the Party leadership.[23]

This Article argues that academic analysis of the current SPC legal reform agenda must recognize that the SPC, no less than any local court,[24] is a deeply pragmatic institution keen on protecting and enhancing its own political, social, and financial health. Self-interested pragmatism, rather than ideological commitment, underlies the developments discussed above: the initiative to accelerate and simplify case-processing decreases both the judiciary's financial reliance on other branches of government and its exposure to potentially contentious social disputes. The pursuit of these objectives makes good sense for a politically vulnerable institution with very limited financial independence, especially after the various personnel changes in 2008 reemphasized that vulnerability and when the Party-state is entering a period of great political, economic, and fiscal uncertainty. The expansion of the SPC's judicial interpretation capacity through "guiding cases" indicates, however, that the SPC is certainly not adverse to expansions of its authority when the

[21] *See* discussion *infra* Part II.A.

[22] *See* discussion *infra* Part II.B.

[23] *See* discussion *infra* Part II.C.

[24] For the strategic decision-making of lower courts, see, e.g., Howson, *supra* note 3.

sociopolitical risk is low. It is a move entirely consistent with the overall impression of institutional pragmatism.

Furthermore, the SPC's handling of both legal professionalism and populism over the past decade arguably derives as much from pragmatic maneuvering as it does from genuine ideological commitment. The judiciary stands to gain much and perhaps lose relatively little by promoting mediation, cooperation with other government institutions, and responsiveness to popular opinion. These measures help it avoid having to take a clear stance in socially or politically controversial disputes and thus lower its exposure to criticism and pressure. The precise methods the SPC has taken to promote mediation are arguably more attuned with a theory of institutional pragmatism than with one that stresses the SPC's ideological internalization of populism.[25] Indeed, many have interpreted the SPC's earlier eagerness to promote legal professionalism and constitutional review as a campaign to increase its own authority and power under relatively accommodating sociopolitical conditions.[26] All things considered, institutional pragmatism is one of the strongest explanations—quite possibly *the* strongest—for the SPC's recent activities, and therefore one of the best predictors of its future course.

Of course, institutional pragmatism is not the only factor that determines the SPC's behavior. Many SPC judges, including the handful of justices at the top, may genuinely believe in the validity of professionalism and populism, although this hardly means that realist calculations of interest are incapable of affecting, or dominating, SPC decision-making. Likewise, directives from the Party leadership may well set basic boundaries for acceptable judicial behavior, but there is usually considerable maneuvering room within those boundaries. This Article complements, not replaces, suggestions that the "tension" between professionalism and populism is ideologically genuine,[27] or that the Party leadership exerts significant control over judicial activity.[28] It does, however, demonstrate the need to go beyond them if we are to accurately understand the SPC.

On a more theoretical and comparative note, the treatment of judiciaries as pragmatic and utilitarian institutions that actively pursue their institutional self-interest is fairly common in studies of pre-modern or early modern legal

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[25] *See* discussion *infra* pp. 22–24.

[26] *See, e.g.*, Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case*, 43 SUFFOLK U. L. REV. 669, 671–74 (2010) (discussing the SPC's motivations behind the Qi Yuling case); Xin He, *The Judiciary Pushes Back: Law, Power and Politics in Chinese Courts*, *in* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 180 (Randall Peerenboom ed., 2009) (discussing recent attempts by the judiciary to strengthen its political position vis-à-vis other government organs).

[27] Such suggestions are discussed *infra* pp. 22–23.

[28] *See supra* note 15.

history.[29] Yet, scholars seem somewhat more hesitant to attach such motivations to contemporary judiciaries in developed nations, with important

[29] To Western legal scholars, the most familiar example would probably be the late-medieval and early modern jurisdictional competition between various Western European legal systems, both secular and ecclesiastical. *See, e.g.*, HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 10 (1983) (outlining the basic thesis of jurisdictional competition); BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE, 1050–1300 (1964) (tracing the development of 12th Century Canon Law as a concentrated effort to expand Papal jurisdiction and authority). The relationship between these various courts was certainly more complex than just competition for influence, see, e.g., R. H. HELMHOLZ, CANON LAW AND THE LAW OF ENGLAND 263–89 (1987) (discussing the intellectual exchanges and influences between judges of various jurisdictions); JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991) (arguing that modern contract law has origins in modern philosophical developments), but that at least seemed to be one prevalent part of it. In England, some level of competition also emerged among various royal courts—between common law and equity courts, but also between various common law courts. *See* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2009); Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1581–1621 (2003) (arguing that jurisdictional competition drove common law courts to create more economically efficient legal doctrine); JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 40–47 (4th ed. 2002) (describing the "internecine struggle for business between the common-law courts" after 1550); RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844, at 25–26 (2000) (noting that Seventeenth and Eighteenth Century common law courts "competed with each other over litigants"); MARJORIE BLATCHER, THE COURT OF KING'S BENCH, 1450–1550: A STUDY IN SELF-HELP (1978) (tracing the development of common law doctrine in the Court of King's Bench as a conscious effort by the court to expand its influence and authority). *But see* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981) (presenting the development of the common law largely as the intellectual development of legal doctrine by professionally-minded jurists); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 292–95 (1975) (arguing against the existence of substantial judicial competition). Backtracking chronologically, Roman judges also seemed to follow a highly pragmatic legal philosophy that saw adjudication and legal analysis primarily as means towards greater personal reputation and social prestige. *See* ALAN WATSON, THE SPIRIT OF ROMAN LAW (1995). Within the Chinese context, scholars have long portrayed late-imperial local magistrates as pragmatic judges who were highly self-conscious about their sociopolitical standing and allowed such concerns to influence their legal decision-making, *see, e.g.*, CH'U TUNG-TSU, LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING (1962); BRADLEY W. REED, TALONS AND TEETH: COUNTY CLERKS AND RUNNERS IN THE QING DYNASTY (2000); Taisu Zhang, *Property Rights in Land and the Relative Decline of Pre-Industrial China*, 13 SAN DIEGO INT. L.J. 129, 158–63 (2011). Some have also argued, with perhaps limited success, that they were in fact more professionally disciplined. PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING 119 (1996) (arguing that magistrates rigorously followed legal rules in the vast majority of cases); Mark A. Allee, *Code, Culture, and Custom: Foundations of Civil Case Verdicts in a Nineteenth-Century County Court*, *in* CIVIL LAW IN QING AND REPUBLICAN CHINA 122, 126–27 (Philip C.C. Huang & Kathryn Bernhardt eds.,

exceptions, particularly in the corporate law realm.[30] For example, while many constitutional scholars have accused United States Supreme Court justices of judicial activism—i.e., promoting their preferred sociopolitical ideology[31]—fewer have considered whether they regularly attempt to enhance the Supreme Court's institutional authority or political status.[32] A possible

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1994) (reaching the opposite conclusion of Huang based on similar sources); Zhang, *supra* note 29 (likewise).

[30] The jurisdictional competition thesis has been routinely applied to the development of corporate law. *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 14–24 (1993); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1438 (1992); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 212–27 (1991). *But see* Marcel Kahan and Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002). For other legal fields, see discussion *infra* note 32.

[31] *See, e.g.*, James R. Rogers & Georg Vanberg, *Resurrecting* Lochner: *A Defense of Unprincipled Judicial Activism*, 23 J.L. ECON. & ORG. 442, 442 (2007) (noting that "the worst" we assume of activist judges is that "they are an unprincipled lot who seek only to implement narrow, class-based personal policy preferences"); HOWARD GILLMAN, THE CONSTITUTION BESIEGED 3 (1993) (commenting that the problem with the activist courts of the early 20th century was that they were "assaulting the doctrine of separation of powers by substituting its conception of good, effective policy-making for that of the legislature"); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 138–39 (1993) (describing a tradition of constitutional legal scholarship, including Alexander Bickel, Robert Burt, Frank Michelman, and Michael Perry, that sees the Supreme Court as "playing the prophet of the modern American Republic"). While critical of the portrayal of the Supreme Court as legal prophet, Ackerman nonetheless sees the Supreme Court's major "constitutional moments" as good-faith attempts to participate in a process of constitutional change that has roots in the founding of the Republic. *Id.* at 140–62.

[32] A common assumption is that the Supreme Court is so institutionally secure that such considerations are unnecessary. *See* discussion *infra* note 267. For discussion and criticism of this trend, see BRUCE ACKERMAN, DECLINE AND FALL OF THE AMERICAN REPUBLIC 1–4 (2010) ("Constitutional thought is in a triumphalist phase."). There are key exceptions. The most important is probably a group of articles on "strategic voting" in the Supreme Court, which examine the political considerations that limit and guide certain aspects of Supreme Court adjudication. This includes, among others, William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (analyzing how the anticipated reaction of other government organs influences the Supreme Court's decision-making); John Ferejohn & Barry Weingast, A *Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992); P.T. Spiller & E.H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347 (1997); Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WISC. L. REV. 1421. *See also* JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION (Christopher E. Smith ed., 1995) (a collection of essays which examine the influence of political practicalities and institutional limitations on the federal judiciary's doctrinal shifts) and the discussion *infra* note 264.

explanation for this difference is that judiciaries in contemporary Western nations enjoy considerable institutional security and are well-entrenched within a tradition of governance, whereas earlier judiciaries faced far greater sociopolitical uncertainty and theoretical ambiguity and thus were more likely to engage in pragmatic maneuvering.[33] In terms of institutional security, the Chinese judiciary has far more in common with these historical judiciaries than it does with, say, the Supreme Court of the United States, suggesting that our emphasis on its institutional pragmatism is not terribly unconventional.

The institutional pragmatism discussed here is quite different from the "legal pragmatism" and "flexibility" often attributed to Chinese legal reform in general.[34] These latter concepts speak primarily to the willingness of the Party-state to adjust or overlook legal doctrine and procedure in order to accommodate practical social, economic, and political needs.[35] While the judiciary regularly and extensively participates in such behavior, its "institutional self-interests" are narrower and sometimes different than the Party-state's general policy objectives. Party leadership and other government organs do not, for example, have the same level or type of interest in the judiciary's long-term financial health or the SPC's judicial interpretation powers. In fact, one may point to recent SPC actions that promote the judiciary's short-term institutional interest at sociopolitical cost to the general Party-state, suggesting that any coherent theory of Chinese legal reform must allocate significant institutional agency to the judiciary.

A study of the SPC's institutional pragmatism seems especially timely given the recent signs of heightened Party control over the judiciary. First, stronger Party control may well heighten the judiciary's political survival

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[33] A fairly common observation made by the various authors cited *supra* notes 29 and 32 is that pragmatic or "strategic" judicial decision-making often stems from the judiciary's institutional vulnerabilities. *See, e.g.*, Klerman, *supra* note 29, at 1186–87 (noting that the various English courts competed for legal fees because none had a reliably monopoly over a category of cases); BAKER, *supra* note 29, at 44 (likewise); BLATCHER, *supra* note 29 (focusing more specifically on the vulnerabilities of King's Bench); Eskridge, *supra* note 32 (discussing how the Executive and Congress' ability to override judicial interpretation prompts strategic decision-making by the Supreme Court). From there, it is but a small step to the thesis that more institutional security and authority decreases the need for strategic behavior.

[34] *See, e.g.*, Liebman, *supra* note 2, at 2–9 (discussing China's "adaptive legality"); Liang Zhiping (梁治平), Fazhi: Shehui Zhuanxing Shiqi de Zhidu Jianshe (法治: 社会转型时期的制度建设) [*Rule of Law: Institution Building in a Time of Social Transition*], *in* Fazhi zai Zhongguo: Zhidu, Huayu yu Shijian (法治在中国: 制度、话语与实践) [RULE OF LAW IN CHINA: INSTITUTIONS, DISCOURSE, AND PRACTICE] 130 (Liang Zhiping [梁治平] ed., 2002) (noting the need for institutional flexibility and pragmatism in a time of social change); Sebastian Heilmann, *Policy Experimentation in China's Economic Rise*, 43 STUD. COMP. INT'L DEV. 1, 6–9 (2007) (noting the willingness of the Chinese state to experiment with policy and lawmaking); Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29 (1989).

[35] *See* sources *supra* note 34.

instincts and increase its willingness to sacrifice intellectual or ideological clarity for practical institutional benefits. This could trigger a pattern of behavior more flexible and pragmatic than what scholars observed a few years ago. Second, institutional pragmatism offers important insights into where the SPC may be headed in the future. Although promoting populism may be consistent with the SPC's short-term need to avoid sociopolitical controversy and pressure, over the long run, it cannot generate the expansion in authority and influence that the judiciary gains by advancing legal professionalism. We may therefore feel more optimistic about the future of legal professionalism in China than the SPC's recent populist rhetoric would suggest, if only because a long-term trend towards professionalism coincides with the SPC's institutional self-interest.

Part I of this Article reviews the 2008 SPC leadership change and the corresponding shift towards populism and surveys academic discussion of these developments. Part II highlights the institutional pragmatism underlying the SPC's ongoing "judicial cost and efficiency" initiative, the establishment of the "guiding cases" system, and several prominent judicial interpretations it has recently worked on. Part III reexamines the SPC's approach to legal professionalism and populism from the perspective of institutional self-interest, arguing that self-interest was conceivably a key concern in its handling of these ideological trends. The Conclusion fits these themes into a broader theoretical discussion about the role of institutional pragmatism in judicial behavior and comments on how the SPC's institutional pragmatism may have long-term consequences for legal reform in China.

A preliminary note on conceptual definition: I follow Liebman in understanding "legal professionalism" to cover the professionalization of both legal actors and institutions.[36] It is thus understood as a broad ideal that incorporates both the monopolization of legal practice and law enforcement by trained professionals and, moreover, at least a "thin" version of the rule of law, in which legal rules effectively constrain state action regardless of their precise content.[37] Establishing such a rule of law is a necessary, but not sufficient, condition for legal professionalism, as it is at least conceptually possible to have general obedience to law without the use of trained professionals.

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[36] Liebman, *supra* note 2, at 7.

[37] *Id.* For discussion on "thick" and "thin" versions of the rule of law, see PEERENBOOM, *supra* note 2, at 2–6. The classic work on this subject is LON FULLER, THE MORALITY OF LAW (1976). Simply put, a "thin" version demands that laws be "general, public, prospective, clear, consistent, capable of being followed, stable, and enforced," whereas thicker versions incorporate certain elements of political morality, including free-market ideals and various conceptions of human-rights. PEERENBOOM, *supra* note 2, at 3.

I. THE SPC UNDER NEW LEADERSHIP

For much of the Post-Mao era, Western observers seemed to feel that Chinese judicial reforms were, if slow, largely praise-worthy: greater legal professionalism, expanding civil and administrative jurisdiction, a slowly growing amount of judicial independence, and baby steps towards establishing some judicial power of constitutional review.[38] The judiciary emphasized the importance of formal judicial education in its hiring process and intensified professional training for judges..[39] And increasingly, the judiciary attempted to assert independence from outside influences, including the media and some other government organs, by stressing the professionally legal nature of their work.[40] The SPC moved to improve the quality and uniformity of judicial reasoning, while strengthening the judiciary's enforcement powers.[41] In administrative cases, which are especially sensitive as they involve suits

[38] *See* sources discussed *supra* notes 6, 7 and 26.

[39] Faguan Fa (法官法) [Judges Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2001, effective Jan. 1, 2002) art. 9, 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 388, *available at* http://www.gov.cn/banshi/2005-05/26/content_1026.htm; Guanyu Jiaqiang Faguan Duiwu Zhiyehua Jianshe de Ruogan Yijian (关于加强法官队伍职业化建设的若干意见) [Opinions on Strengthening the Professionalism of the Judicial Corps] (promulgated by the Sup. People's Ct., July 18, 2002, effective July 18, 2002) art. 26, SUP. PEOPLE'S CT. GAZ., Apr. 1, 2002, at 114, *available at* http://law.lawtime.cn/d411666416760.html; Wu Huanqing & Tian Yu (邬焕庆 & 田雨), Xianzhi Faguan Jiangzai 5 Nian lei Quanbu Dadao Benke Xueli (现职法官将在 5 年内全部达到本科学历) [*All Current Judges Will Obtain Professional Degree Within 5 Years*], Xinhua Wang (新华网) [XINHUA NET] (Sept. 5, 2002, 4:54 PM), *available at* http://news.xinhuanet.com/newscenter/2002-09/05/content_551349.htm (describing a SPC directive requiring that all judges below the age of forty must acquire a professional degree within five years and that older judges must at least obtain some additional training); Tian Yu (田雨), Wenping Shangqu ≠ Shuiping Tigao, Faguan Peixun bu Buneng Zhi Benzhe Wenping Qu (文凭上去≠水平提高，法官培训不能只奔着文凭去) [*An Advanced Degree Does Not Equal Enhanced Ability, Judges' Training Should Not Solely Aim at Degrees*], Xinhua Wang (新华网) [XINHUA NET] (Mar. 11, 2004, 3:45 PM), http://news3.xinhuanet.com/newscenter/2004-03/11/content_1360136.htm.

[40] Liebman, *supra* note 5, at 14–19.

[41] Guanyu zai Quanguo Fayuan Minshi he Xingzheng Shenpan Bumen Kaizhan "Guifan Sifa Xingwei, Cujin Sifa Gongzheng" Zhuanxiang Zhenggai Huodong de Tongzhi (关于在全国法院民事和行政审判部门开展"规范司法行为、促进司法公正"专项整改活动的通知) [Notice Regarding Implementing the "Standardizing Judicial Acts, Enhancing Judicial Justice" Special Modification and Correction Event in the Civil and Administrative Divisions in People's Courts Nationwide] (promulgated by the Sup. People's Ct., July 15, 2005, effective July 15, 2005), *available at* http://www.law-lib.com/law/law_view.asp?id=106254; Liebman, *supra* note 5, at 13, 15–16.

against government actors, courts took tentative steps to expand their jurisdiction.[42]

Of course, the judiciary's relationship to other government organs or the Party underwent no fundamental change. Lower courts remained financially dependent on local governments, despite proposals by the SPC to centralize judicial funding, and at no time did the judiciary seem prepared to effectively constrain the Party's authority.[43] Many, perhaps most, legal reform projects came with express government or Party approval.[44] Indeed, the courts may have played a lesser role in legal change compared to other government organs.[45]

Nonetheless, one could sense that courts were not merely "passive" agents of the Party-state, obediently carrying out the policy directives they received.[46] Instead, they actively pursued reforms that would boost judicial professionalism and institutional competence. These were objectives that many Western observers supported, even if the reforms took place at an agonizingly slow pace. Indeed, if one took a long-term approach, the trend towards professionalization might eventually safeguard against political abuse of power.[47] Even if this was impractical for the near future, greater legal consistency and broader judicial competence nonetheless bode well for China's economic development and integration into the global market.[48]

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[42] Li Fujin (李富金), Xingzheng Shenpan de Kunjing yu Chulu (行政审判的困境与出路) [*The Difficult Situation of Administrative Adjudication and the Way Out*], Dongfang Fayan (东方法眼) [E. LEGAL PERSP.] (Nov. 19, 2003, 8:33 PM), http://www.dffy.com/faxuejieti/xz/200311/ 20031119203349.htm. One notable development was the allowance of suits against public universities under the Administrative Litigation Law. *See* Thomas F. Kellogg, *"Courageous Explorers"?: Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141 (2007).

[43] Liebman, *supra* note 5, at 19 ("Courts do not appear more likely to challenge Party authority than in the past."). For the judiciary's lack of financial independence, see, among other articles, He Weifang (贺卫方), Sifa Gaige de Bada Nanti (司法改革的八大难题) [*Eight Great Difficulties with Judicial Reform*], Haikou Shenpan (海口审判) [HAIKOU TRIAL], no. 1, 2002, at 4, *available at* http://article.chinalawinfo.com/article_print.asp?articleid=19684.

[44] Hand, *supra* note 6; Liebman, *supra* note 5, at 2, 37–39 (discussing the Party-state's interest in developing a relatively effective and professional judiciary). If anything, Western scholars tend to overemphasize the Party-state's control over the judiciary. *Compare* Minzner, *supra* note 4, *and* Zang, *supra* note 12, *with* the discussion *supra* note 26.

[45] The most economically significant changes to the Chinese legal system, for example, have been made via legislation, not judicial action. *See* Clarke, *supra* note 1.

[46] *See* discussion *supra* notes 16–18.

[47] For more optimistic assessments, see PEERENBOOM, *supra* note 6; Grimheden, *supra* note 6. Others have expressed greater caution. *See* discussion *supra* note 7.

[48] *See* Donald C. Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Development in China*, 10 UCLA PAC. BASIN L.J. 1, 74–76 (1991) (discussing the value of

Much of this came from "bottom-up" experimentation by lower courts,[49] but the SPC also played a leading role in numerous issues. The *Qi Yuling* case[50] was, perhaps, the most controversial step the SPC took to expand judicial authority. As divisive as the case soon became in academic circles, it undeniably speaks volumes about the SPC's institutional ambitions at the time. The case involved a young woman (Qi) who took a secondary school entrance examination and passed. Another woman intercepted her admissions letter, took on Qi's identity to enroll, and continued to use Qi's identity as she found employment.[51] Qi later discovered this and sued, claiming that she had suffered "infringement of her right to her name and deprivation of her right to an education."[52] At the time, the only plausible legal source for the latter claim was the Chinese constitution, leading the Provincial People's Court hearing the case to seek the SPC opinion on awarding damages for an infringement of

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stronger legal institutions to China's economic development); Clarke, *supra* note 1 (discussing the role of stronger legal institutions in stimulating growth). There is, of course, a substantial literature on whether formal legal institutions have played, or need to play, a central role in promoting economic growth in China. Many authors emphasize that informal institutions and property rights have been just as important, if not more so, but few would go so far as to claim that further development of formal legal institutions is undesirable or unnecessary in the long run. *See* Katharina Pistor & Chenggang Xu, *Governing Stock Markets in Transition Economies: Lessons from China*, 7 AM. L. & ECON. REV. 1 (2005); Frank Allen, Jun Qian & Meijun Qian, *Law, Finance and Economic Growth in China*, 77 J. FIN. ECON. 57 (2005); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003); Minxin Pei, *Does Legal Reform Protect Economic Transactions? Commercial Disputes in China*, *in* ASSESSING THE VALUE OF LAW IN TRANSITION COUNTRIES 180 (Peter Murrell ed., 2001).

[49] Liebman, *supra* note 5, at 30–36.

[50] Qi Yuling Su Chen Xiaoqi Deng yi Qinfan Xingming Quan de Shouduan Qinfan Xianfa Baohu de Gongmin Shou Jiaoyu de Jiben Quanli Jiufen An (齐玉苓诉陈晓琪等以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利纠纷案) [Qi Yuling v. Chen Xiaoqi et al., Case of Infringement of a Citizen's Constitutionally-Protected Basic Right of Receiving Education by Infringing on Her Right of Name], SUP. PEOPLE'S CT. GAZ. 158 (Shandong High People's Ct. Aug. 23, 2001) [hereinafter *Qi Yuling v. Chen Xiaoqi*]. The SPC reply document was Guanyu yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shou Jiaoyu de Jiben Quanli Shifou Ying Chengdan Minshi Zeren de Pifu (关于以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利是否应承担民事责任的批复) [Official Reply on Whether the Civil Liabilities Shall Be Borne for Infringement on a Citizen's Constitutionally-Protected Basic Right of Receiving Education by Means of Infringing on Her Right of Name] (promulgated by the Sup. People's Ct., July 24, 2001, effective Aug. 13, 2001, repealed Dec. 24, 2008), SUP. PEOPLE'S CT. GAZ., May 1, 2001, at 152 [hereinafter SPC Reply to *Qi Yuling*], *available at* http://www.law-lib.com/law/law_view.asp?id=15994.

[51] *Qi Yuling v. Chen Xiaoqi*, *supra* note 50.

[52] *Id.*

a constitutional right. A year later, the SPC approved the damages, breaking away from the previous convention that courts should not cite or rely on the constitution in their judgments.[53] And on the same day as the SPC's decision, Huang Songyou, then chief judge of the SPC's First Civil Tribunal, published an article in the SPC's official newspaper, claiming that he hoped the Chinese judiciary would be able to find its own *Marbury v. Madison* and establish the power of constitutional review in ordinary courts.[54]

Realizing that this article was essentially a commentary on the *Qi Yuling* decision, academic circles fervently debated whether the decision could really ignite judicial constitutional review in China. Many pointed out serious flaws in the SPC's legal reasoning, noting that the Chinese constitution gave courts no express powers of constitutional review and that such powers were explicitly left to the National People's Congress and its Standing Committee.[55] Others found the decision dissatisfying, as it only recognized constitutional rights against another individual, not against the government.[56] One thing did seem clear: by issuing the decision and simultaneously allowing Huang to

[53] SPC Reply to *Qi Yuling*, *supra* note 50. For a summary of the conventional view that Chinese courts should not engage in constitutional review, see Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT. J. CON. L. 215, 220–26 (2009).

[54] Huang Songyou (黄松有), Xianfa Sifahua ji Qi Yiyi—Cong Zuigao Renmin Fayuan Jintian de Yi Ge "Pifu" Tan Qi (宪法司法化及其意义—从最高人民法院今天的一个《批复》谈起) [*The Significance of Institutionalizing the Constitution in Judicial Process—On a Supreme People's Court Opinion*], Renmin Fayuan Bao (人民法院报) [PEOPLE'S CT. DAILY], Aug. 13, 2001, *available at* http://politics.csscipaper.com/lawclass/constitution/23907.html.

[55] *See* Zhai Xiaobo (翟小波), Daiyi Jiguan Zhishang de Renmin Xianzheng (代议机关至上的人民宪政) [*People's Constitutional Governance Under the Parliamentary Supremacy System*], 1 Qinghua Faxue (清华法学) [TSINGHUA L. REV.] 35, 36 (2007); Liu Songshan (刘松山), Weixian Shencha de Leng Sikao (违宪审查热的冷思考) [*Thoughts on Cooling Down the Constitutional Review Fever*], 1 Faxue (法学) [LEGAL STUD.] 36 (2004); Tong Zhiwei (童之伟), Xianfa Sifa Shiyong Yanjiu zhong de Jige Wenti (宪法司法适用研究中的几个问题) [*Various Problems in Research on the Usability of the Constitution*], 11 Faxue (法学) [LEGAL STUDIES] 3, 38, 51 (2001); Qiang Shigong (强世功), Xianfa Sifahua de Beilun (宪法司法化的悖论) [*The Contradictory Theorizing of Judicialization of the Constitution*] 2 Zhongguo Shehui Kexue (中国社会科学) [SOC. SCI. CHINA] 18, 18–19 (2003).

[56] *See* Tong Zhiwei (童之伟), Xianfa Shiyong Ying Yixun Xianfa Benshen Guiding de Lujing (宪法适用应依循宪法本身规定的路径) [*The Constitution's Application Should Follow the Path Stipulated by Constitution Itself*], 6 Zhongguo Faxue (中国法学) [CHINA LEGAL SCI.] 22, 27 (2008); Donald C. Clarke, *Supreme People's Court Withdraws Qi Yuling Interpretation*, CHINESE L. PROF BLOG (Jan. 19, 2009), http://lawprofessors.typepad.com/china_law_prof_blog/2009/01/supreme-peoples.html.

publish his article in its official newspaper, the SPC leadership supported this rather bold attempt to "expand judicial power."[57]

Qi Yuling fits into the general trend "towards professionalization and formality"[58] that characterized judicial reforms from 1978 to the early 2000s. The SPC's attempt to obtain constitutional review powers, if actually successful, would have strengthened judicial independence, a key component of legal professionalism—courts cannot stay true to their professional judgment without possessing some measure of institutional independence. Moreover, the SPC probably would not have attempted *Qi Yuling* without first making some progress in strengthening judicial competence and professionalism: an incompetent and unprofessional judiciary has no clear justification for seeking powers of constitutional review. The expansionist ambitions underlying *Qi Yuling* are therefore quite representative of the SPC's general "institutional mentality" during this era.

While SPC leadership changes in 2008 seems to indicate a turning point in the judiciary's institutional development, "populist" trends had arguably emerged well before Wang Shengjun's appointment. The "justice for the people" slogan appeared in SPC documents as early as 2003, when Xiao Yang argued that courts should revive the legal traditions of the 1930s Jiangxi Soviet era by "carefully following and enforcing laws that served the fundamental interests of the people" rather than "private interests."[59] In other words, courts needed to become more responsive to the practical and sentimental needs of the general public: courts should, for example, respond swiftly to appeals, conclude cases efficiently, apply simplified legal procedures when appropriate,[60] remind litigants of procedural requirements beforehand, inform them of the risks associated with litigation, provide legal aid to those that qualify, reduce processing fees for the poor, increase control over court-direction mediation and its efficiency, and provide closer legal guidance to people's mediation committees.[61]

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[57] Tong, *supra* note 26.

[58] Liebman, *supra* note 2, at 7.

[59] Fan Wei & Li Yumei (范伟 & 李玉梅), Zhongguo Shouji Dafaguan Xiao Yang: Sifa Weimin Bu Shi Jiandan Kouhao (中国首席大法官肖扬: 司法为民不是简单口号) [*Chinese Chief Justice Xiao Yang: Justice for the People Is Not a Simple Slogan*], Zhongguo Xinwen Wang (中国新闻网) [CHINA NEWS] (Sept. 20, 2003, 3:34 PM), http://www.chinanews.com.cn/n/2003-09-20/26/348871.html. The formal SPC document accompanying this interview was Guanyu Luoshi 23 Xiang Sifa Weimin Juti Cuoshi de Zhidao Yijian (关于落实 23 项司法为民具体措施的指导意见) [Guiding Opinion of the Supreme People's Court on Twenty-Three Specific Measures for Implementing Justice for the People] (promulgated by the Sup. People's Ct., Dec. 2, 2003, effective Dec. 2, 2003) SUP. PEOPLE'S CT. GAZ., June 1, 2003, at 9 [hereinafter Twenty-Three Measures for Implementing Justice], *available at* http://www.lawinfochina.com/law/display.asp?id= 3301.

[60] The use of summary procedure is explained in greater detail at infra, pp, 24–26.

[61] Twenty-Three Measures for Implementing Justice, *supra* note 59.

None of these measures, however, foreshadowed the SPC's "mediate whenever possible" campaign that has drawn so much academic attention in recent years.[62] In 2004, SPC leadership began advocating a "mediate if possible, adjudicate if appropriate" (能调则调，能判则判) (*neng tiao ze tiao, dang pan ze pan*) slogan in speeches and press releases.[63] These eventually led to a 2007 SPC opinion that declared the "mediate if possible" slogn as a "guiding agenda" of the Chinese judiciary, along with a strong emphasis on "resolving cases and solving problems to promote social harmony" (案结事了 促进和谐) (*anjie shiliao, cujin hexie*).[64] SPC leaders felt that "excessive attention to adjudication and emphasis on procedure ha[d] failed to resolve disputes or social contradictions" and, therefore, that "courts must take more pragmatic and involved approaches to solving problems."[65] Initially, the SPC took a reasonably moderate approach towards encouraging mediation, stating that mediation could not be coerced and that courts should hesitate to set the percentage of cases settled via mediation as a benchmark for judicial performance.[66]

From 2007 onwards, as Wang Shengjun replaced Xiao Yang as SPC President, these populist trends—populist in that they emphasize judicial responsiveness to public opinion[67]—swiftly grew in visibility. The "Three Supremes" doctrine discussed above attracted a particularly large amount of

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[62] *See supra* note 12.

[63] Wu Jing (吴兢), Xiao Yang: Mo Gei Tiaojie Ding Zhibiao (肖扬: 莫给调解定指标) [*Xiao Yang: Do Not Set Target Quotas for Mediation*], Renmin Ribao (人民日报) [PEOPLE'S DAILY], Jan. 17, 2007, at 14, *available at* http://politics.people.com.cn/GB/1027/5291665.html. Other SPC justices made follow-up statements, for example, Tiaopan Jiehe Hexie Sifa (调判结合 和谐司法) [*Unify Mediation and Adjudication, Judicial Harmony*], Renmin Wang (人民网) [PEOPLE'S NET] (March 7, 2007, 3:49 PM), http://www.people.com.cn/GB/32306/54155/57487/5448606.html (interview with SPC justice Wan Exiang). For academic commentary, see Yi Zhongfa (易忠法), Lun "Anjie Shiliao" (论"案结事了") [*Discussing "Deciding the Case and Solving the Problem"*], 2 Fazhi yu Shehui (法制与社会) [LAW & SOC'Y] 194 (2008).

[64] Guanyu Jin Yi Bu Fahui Susong Tiaojie zai Goujian Shehui Zhuyi Hexie Shehui zhong Jiji Zuoyong de Ruogan Yijian (关于进一步发挥诉讼调解在构建社会主义和谐社会中积极作用的若干意见) [Several Opinions on Further Enhancing the Positive Effect of Court-Directed Mediation in the Construction of a Harmonious Socialist Society] (promulgated by the Sup. People's Ct., Mar. 6, 2007, effective Mar. 6, 2007), SUP. PEOPLE'S CT. GAZ., Apr. 1, 2007, at 25, *available at* http://rmfyb.chinacourt.org/public/detail.php?id=106477.

[65] Liebman, *supra* note 2, at 17.

[66] *E.g.* Wu, *supra* note 63.

[67] *See* Liebman, *supra* note 2, at 7 (discussing the courts' professed desire to "better serve the people and to be proactive in response to disputes" by deemphasizing legal formality and promoting "populist" dispute-resolution methods).

controversy among lawyers and academics,[68] as did Wang's repeated praise for Ma Xiwu, a Communist judge from the 1930s famous for promoting mediated and informal means of dispute resolution over formal legal procedure.[69] Wang's reference to Ma Xiwu's example in his March 2009 Work Report to the National People's Congress was the first time an SPC work report had done so since at least 1978.[70] This prompted a senior American scholar to comment that "the populist, from-the-masses-to-the-masses, procedure-be-damned Ma Xiwu style is definitely making a rhetorical comeback."[71]

In the SPC's third five-year legal reform plan, issued in 2009, "resolutely follow the mass line" (坚持群众路线) (*jianchi qunzhong luxian*) became a central principle of judicial reform, requiring courts to accommodate public opinion and "willingly accept the review and inspection by the people."[72] Meanwhile, the SPC continued to promote mediation as the default dispute-resolution procedure in civil cases. This led to a steady increase in the percentage of civil cases resolved via mediation or withdrawal—65.3% in 2010, up from 55% in 2006.[73] Highlighting the importance of mediation in the SPC's

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[68] *See supra* notes 10, 11.

[69] Wang Shengjun (王胜俊), Zuigao Renmin Fayuan Gongzuo Baogao (2009) (最高人民法院工作报告 [2009]) [Supreme People's Court Work Report (2009)], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Apr. 1, 2009, at 339 [hereinafter Wang, SPC Work Report 2009], *available at* http://www.gov.cn/2009lh/content_1261101.htm (delivered at the 2d plenary session of the 11th National People's Congress on Mar. 10, 2009); Bai Long (白龙), Wang Shengjun Yaoqiu Ganjing Xuexi Ma Xiwu Zuo Yi Xin Weimin de "Pingmin Faguan" (王胜俊要求干警学习马锡五做一心为民的"平民法官") [*Wang Shengjun Demands that Policemen Learn from Ma Xiwu and Become "Commoner Judges" that Only Serve the People*], Renmin Ribao (人民日报) [PEOPLE'S DAILY], Aug. 8, 2009, *available at* http://www.npc.gov.cn/npc/xinwen/fztd/sfgz/2009-08/08/content_1512847.htm; Wang Ye (王烨), Ma Xiwu Shenpan Fangshi Zhanting zai Gansu Luocheng (马锡五审判方式展厅在甘肃落成) [*The Exhibit Hall of the Ma Xiwu Adjudication Method Opens in Gansu*], Zhongguo Fayuan Wang (中国法院网) [CHINA COURTS NET] (Jan. 22, 2009, 8:14 AM), http://www.court.gov.cn/news/bulletin/release/200901220004.htm.

[70] Wang, SPC Work Report 2009, *supra* note 69.

[71] Donald C. Clarke, *Supreme People's Court Work Report: Comments*, CHINESE L. PROF BLOG (Apr. 9, 2009), http://lawprofessors.typepad.com/china_law_prof_blog/2009/04/supreme-peoples-court-work-report.html.

[72] Renmin Fayuan Di San Ge Wu Nian Gaige Ganyao (2009–2013) (人民法院第三个五年改革纲要 [2009–2013]) [The Third Five-Year Reform Plan for the People's Courts (2009–2013)] (promulgated by the Sup. People's Ct., Mar. 17, 2009, effective Mar. 17, 2009) SUP. PEOPLE'S CT. GAZ., May 1, 2009, at 16 [hereinafter Third Five-Year Plan], *available at* http://www.chinacourt.org/flwk/show.php?file_id=134421.

[73] Wang Shengjun (王胜俊), Zuigao Renmin Fayuan Baogao (2011) (最高人民法院工作报告 [2011]) [Supreme People's Court Work Report (2011)], STANDING COMM. NAT'L PEOPLE'S CONG., Apr. 15, 2011, at 341 [hereinafter Wang, SPC Work Report 2011], *available at* http://www.gov.cn/2011lh/content_1827715.htm (delivered at the 4th plenary session of

policy agenda, Wang argued that implementing the "Three Supremes" requires courts to "understand people's needs in a timely fashion and adjust judicial policy accordingly," and that promotion of mediation and "anjie shiliao" are keys to doing so.[74]

Mediation is, of course, but one aspect of the SPC's "populist turn." The promotion of "the mass line" naturally requires courts to establish and maintain avenues for the public to voice their concerns and demands, as SPC reform agendas have clearly emphasized.[75] Wang has even suggested that judicial decisions in capital punishment cases should consider "the feelings of the masses," and that judicial reforms should generally accept the inspection of the media.[76] Other changes include ongoing implementation of the 2003 "justice for the people" agenda: increasing case processing efficiency, requiring judges to provide procedural guidance to litigants, reducing litigation fees, and so on.[77]

In addition to promoting responsiveness to public opinion and interests, the SPC has also stressed the importance of accepting the "supremacy of the Party" and cooperating with other government.[78] The Third Five-Year Plan, for example, states that legal reform measures should "resolutely follow the leadership of the Party" and "accept the supervision of the people's congresses," so as to protect the "constitutional status and judicial authority" of the courts.[79] In comparison, the previous five-year plan contained no such language.[80]

Unlike the wide-ranging but fairly visible consequences of the "populist turn," it is difficult to credit any actual changes in SPC policy to the emergence of the "First Supreme." Courts have never strayed far from the Party's control,

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the 11th National People's Congress on Mar. 11, 2011); Liebman, *supra* note 2, at 18 (citing LAW Y.B. CHINA 2007, at 1066).

[74] Wang, *supra* note 10.

[75] Third Five-Year Plan, *supra* note 72, at §§ 2–25 to 2–30.

[76] Qin Xudong (秦旭东), Zuigao Fayuan Yuanzhang Tan Sixing Yiju Yinfa Zhengyi (最高法院院长谈死刑依据引发争议) [*The President of the Supreme People's Court's Discussion of the Basis for Capital Punishment Stirs Up Controversy*], Caijing Wang (财经网) [CAIJING] (Apr. 11, 2008, 3:15 PM), http://www.caijing.com.cn/20080411/56061.shtml.

[77] Twenty-Three Measures for Implementing Justice, *supra* note 59.

[78] *See* Wang, *supra* note 10.

[79] Third Five-Year Plan, *supra* note 72.

[80] Renmin Fayuan Di Er Ge Wu Nian Gaige Ganyao (2005–2008) (人民法院第二个五年改革纲要 [2005–2008]) [The Second Five-Year Reform Plan for the People's Courts (2005–2008)] (promulgated by the Sup. People's Ct., Oct. 26, 2005, effective Oct. 26, 2005) SUP. PEOPLE'S CT. GAZ., Dec. 10, 2005, at 8 [hereinafter Second Five-Year Plan], *available at* http://www.law-lib.com/law/law_view.asp?id=120832.

and so perhaps there is little to change except the rhetoric. The judiciary's gradual development of legal professionalism almost certainly received Party approval. In fact, it fits in very well with the "rule the country according to law" (依法治国) (*yifa zhiguo*) rhetoric that the Party-state has trumpeted for over a decade.[81] While the *Qi Yuling* case did veer away from established political conventions and might have expanded judicial authority beyond what Party leaders were comfortable with, such cases have always been the extremely rare exception.[82]

The latest turn in the *Qi Yuling* saga, however, suggests that the Party has indeed strengthened its control over the judiciary. On December 18, 2008, in a batch of twenty-seven judicial interpretations declared invalid, the SPC quietly threw out *Qi Yuling* by simply stating that it "no longer applied."[83] Scholars hastened to comment, generally arguing that the decision was a combination of external pressure and the self-interest of the new SPC leadership.[84] As a prominent Chinese constitutional law scholar stated: "[The abolishment of *Qi Yuling*] indicates that the political leadership . . . recognized that allowing the courts a direct role in the enforcement of the Constitution would undermine China's political structure. . . For the new leadership of the Supreme Court, the Reply to Qi Yuling's Case represented a political burden . . . ."[85] Others observed that, "despite the SPC's best efforts to avoid crossing any political lines [in *Qi Yuling*], the response from above was negative."[86]

At the same time, the SPC has sustained its promotion of legal professionalism and judicial independence. The Third Five-Year Plan calls for

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[81] *See* Xiao Yang (肖扬), Yifa Zhiguo Jiben Fangzhen de Tichu, Xingcheng, he Fazhan (依法治国基本方针的提出, 形成, 和发展) [*The Proposal, Formation, and Development of the "Rule the Country According to Law" Directive*], 求是 [QIU SHI], no. 20, 2007, at 18, *available at* http://www.qstheory.cn/zxdk/2007/200720/200907/t20090707_6783.htm.

[82] Kellogg, *supra* note 53, at 245 (noting that, although judicial activists have made numerous constitutional arguments in cases, the courts and the government generally do not respond to them).

[83] Guanyu Feizhi 2007 Nian Di Yiqian Fabu de Youguan Sifa Jieshi (Di Qi Pi) de Jueding (关于废止 2007 年底以前发布的有关司法解释[第七批]的决定) [The Decision Concerning the Abolishment of Judicial Interpretations Issued Before the End of 2007 (7th Batch)] (promulgated by the Sup. People's Ct., Dec. 8, 2008, effective Dec. 24, 2008) § 26, SUP. PEOPLE'S CT. GAZ., Feb. 1, 2009, at 7, *available at* http://www.chinacourt.org/html/article/200812/24/337161.shtml.

[84] *See* Tong, *supra* note 26, at 109; Clarke, *supra* note 56 ("An interesting political question: is this part of an attack on Xiao Yang, which has seen him rumored, apparently falsely, to have been put under *shuanggui* [Party disciplinary detention] on suspicion of corruption, and may be connected with the downfall of Huang Songyou, a former SPC vice president, on corruption charges?").

[85] Tong, *supra* note 26, at 677.

[86] Thomas E. Kellogg, *The Death of Constitutional Litigation in China?*, CHINA BRIEF, Apr. 2, 2009, at 5, *available at* http://www.jamestown.org/uploads/media/cb_009_7_02.pdf.

leadership of the Party and a promotion of the "mass line," but also stresses that judges should continue to advance their level of professional training and that courts should strengthen their ability to "independently and fairly exercise their power of adjudication."[87] While the judiciary is certainly familiar with the academic convention that populism may be incompatible with legal professionalism and judicial independence, it has been content to place these ideals side-by-side and, perhaps, hoping for a workable balance to emerge in practice.[88] Scholars therefore observe that the judiciary is characterized by "tension between trends toward professionalism and populism."[89] The heightened degree of political control by the Party is, of course, an "external limiting condition" that no one ignores.

Existing scholarship on the rise of legal populism and "Party supremacy" in recent SPC policy has generally done a better job of tracing these developments and debating their normative merits than explaining their underlying causes. While the increase in Party control is not terribly surprising—it is only natural for an authoritarian state to desire strong control over its legal apparatus—motivations behind the promotion of legal populism are not well understood. Chinese scholars and lawyers have rarely attempted to pry into the SPC's "original intent," perhaps concerned with the political sensitiveness of the issue.[90] Western scholars, in contrast, are limited by their small numbers. Liebman's "populism" paper was essentially the first American piece to systematically examine the "populist turn," and thus understandably focused more on the "how" than the "why."[91] It identified a few potential underlying motives but expends little energy in evaluating their relative

[87] Third Five-Year Plan, *supra* note 72, at § 2-10.

[88] *See* Yi Dao San (一刀三), Ye Tan Sifa de Dazhonghua yu Faguan de Zhiyehua (也谈司法的大众化与法官的职业化) [*Another Analysis of Judicial Populism and the Professionalization of Judges*], Falü Boke (法律博客) [LEGAL BLOGS] (Aug. 28, 2008, 3:26 PM), http://heweifang.fyfz.cn/art/379089.htm; Qiao Bei Ma (桥北马), Ye Tan Sifa Zhiyehua yu Dazhonghua (也谈司法职业化与大众化) [*Another Analysis of Judicial Professionalization and Populization*], Ninbo Falü Wang (宁波法律网) [NINGBO L. NET] (Oct. 16, 2008), http://www.eccfy.com/fxyt/ShowArticle.asp?ArticleID=4239; He Weifang, Ma Huaide & He Bing (贺卫方, 马怀德 & 何兵), Sifa Gaige de Lujing: Sifa de Zhiyehua yu Sifa de Minzhuhua (司法改革的路径: 司法的职业化与司法的民主化) [*Paths of Judicial Reform: Judicial Professionalization and Judicial Democratization*], CHINALAWINFO, http://article.chinalawinfo.com/ArticleHtml/Article_28003.shtml (last visited Jan. 27, 2012).

[89] Liebman, *supra* note 2, at 1, 7.

[90] Tong, *supra* note 26, is one of the extremely rare exceptions and, it must be noted, was published in an American law journal, rather than in China.

[91] Liebman, *supra* note 2, at 9-23.

importance, perhaps leaving those issues for future research.[92] Few scholars have followed up on them.[93]

From the SPC's point of view, there are three possible kinds of motivations, logically distinct but nonetheless capable of coexistence. First, it may simply be carrying out orders. The Party-state decides that legal populism is desirable and demands that the judiciary follows suit. The purest version of this theory would deny the judiciary any substantial agency in forming the populist reform agenda, although that is certainly an exaggeration. Second, the SPC, or at least much of its leadership, may have genuinely internalized populism as a guiding principle of legal reform. For whatever reason—ideology, tradition, or other factors—populism possesses normative, even moral, value, and simply deserves to be promoted. Third, the SPC may possess pragmatic ulterior motives: strengthening its finances, boosting its public reputation, or avoiding public or political controversy. Basically, this theory sees the SPC as a "rational actor" that pursues its institutional self-interest.

This brings up the preliminary point of whether the SPC is a consolidated institution that possesses coherent "self-interests" and is somewhat capable of advancing them. Given the strict bureaucratic hierarchy within the SPC, it is, at the very least, an organized institution with a fairly clear system of command.[94] Because the sociopolitical standing of SPC leaders are directly related to that of the judiciary, one would imagine that they have strong personal incentives to protect and enhance its political standing, social reputation, and financial health. Moreover, as stated above, the judiciary currently handles a legal apparatus far too complex in both legal and administrative dimensions for external political forces to directly dictate every substantive SPC decision.[95] We may therefore assume that the SPC possesses significant agency in developing and implementing judicial reform agendas. Certainly its leaders generally wish to please Party superiors, but they at least have considerable discretion in choosing how to do that.

Liebman's paper touches upon all three theories but also seems to emphasize the second and third over the first, and the second in particular. It highlights the "historical continuities" between the SPC's current promotion of populism and precedents set in the Ma Xiwu era, suggesting that there is a Chinese Communist "legal tradition" that guides and encourages recent developments.[96] This suggests a fairly normative interpretation of the "populist turn": by and large, the Chinese judiciary is simply connecting to its own normative traditions, which do not conform to Western notions of legal

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[92] *Id.* at 24–27.

[93] I find only three articles that explicitly attempt to explain why the "populist turn" occurred: Minzner, *supra* note 4; Zang, *supra* note 12; Peerenboom, *supra* note 12.

[94] *See* Finder, *supra* note 2; PEERENBOOM, *supra* note 2.

[95] *See* discussion surrounding *supra* notes 16–18.

[96] Liebman, *supra* note 2, at 24–27.

professionalism.[97] Yet, Liebman also acknowledges that the promotion of populism "may in significant part consist of using revolutionary language to pursue divergent and diffuse goals," including "show[ing] courts' loyalty to Party leadership," "protect[ing] courts from criticism," and "facilitat[ing] innovation."[98] Populism can, therefore, become a "tool for legal institutions to promote their own authority and legitimacy."[99] The paper does not elaborate further.

Other studies of the Wang Shengjun Court have come down more firmly on the side of one specific theory. Based on a close reading of the SPC's Third Five-Year Plan, Randall Peerenboom argues that the Court's judicial reform agenda "reflects a pragmatic political compromise. The court accepts some limits on its powers and refrains from challenging other organs in exchange for cooperation on certain issues that enhance the judiciary's power and authority."[100] One wonders, however, if an analysis of only the Third Five-Year Plan can adequately support a broad thesis of institutional pragmatism.

Zang Dongsheng has suggested a more pessimistic view: populism derives directly from the Party's conviction that "the legal profession must be brought under control, repeatedly."[101] His paper therefore straightforwardly applies the second theory but provides little analysis of actual SPC policy. A recent article by Carl Minzner likewise sees the Court's "populist turn" as directly derivative of a broader "turn against law" that permeates the entire Chinese Party-state.[102] Minzner argues, correctly, that Party leaders have deemphasized formal legal procedure largely as a pragmatic response to growing social unrest.[103] Like any other government organ, the SPC has simply been implementing these directives. Examining the conflict between "mediatory" and "adjudicatory" justice in the later Xiao Yang years, Fu Hualing and Richard Cullen also argue that the reemphasis on mediation is due to pressure from the Party leadership.[104] While these observations are accurate to some extent, they overlook, as argued both above and below, the SPC's substantial agency in judicial policy-making.

To provide a deeper analysis of the institutional intent behind recent SPC policy-making, this Article places the SPC's "populist turn" within a broader

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[97] *Id.* at 25–26.

[98] *Id.* at 24.

[99] *Id.* at 15.

[100] Peerenboom, *supra* note 12, at 9.

[101] Zang, *supra* note 12, at 93.

[102] Minzner, *supra* note 4.

[103] *Id.* at 19–20 (explaining the "turn against law" by emphasizing the Party-state's overall short-term policy concerns, including limiting social unrest and bringing the judiciary back under closer surveillance).

[104] Fu & Cullen, *supra* note 6, at 54–66.

context of judicial activity. Although academic studies of SPC policy have predominantly focused on developments related to legal professionalism, populism, or Party control, many of the SPC's most important and visible recent actions are largely unrelated—and indeed often contradictory—to these factors. Instead, they were designed to conserve the judiciary's financial or human resources, avoid engagement with potentially controversial issues, and strengthen the SPC's powers of judicial interpretation. The deep institutional pragmatism underlying these actions strongly suggests that we reconsider, at least partially, the SPC's promotion of both legal populism and professionalism as strategic moves designed to enhance its sociopolitical standing. There is no denying that SPC judges are fully capable of internalizing one, or even both, of these ideologies, but one wonders if the SPC would have taken these steps without the lure of potential institutional benefits. I argue that the SPC has been, and will probably continue to be, a rational institutional actor that largely pursues its self-interest.

II. CASE STUDIES OF INSTITUTIONAL PRAGMATISM

This Part examines some of the SPC's most significant legal reform projects and judicial interpretations of the past two years, including changes in legal procedure, substantive law, and the Court's institutional authority. It argues that the straightforward pursuit of institutional self-interest is a far more persuasive explanation for these activities than external political pressure or ideological commitment to either professionalism or populism.

A. "Judicial Cost and Efficiency"

Within the SPC's current work agenda, the phrase "judicial cost and efficiency" generally refers to a specific ongoing project undertaken by the SPC's Institute for Applied Legal Studies (IALS) and sponsored by both the European Union and the United Nations Development Programme.[105] This project is but one part of a broader SPC initiative to streamline case processing and prevent the buildup of docket backlogs. Like other developments

[105] There is a brief description of the project at the start of Gu Lijun (顾利军), "Sifa Xiaolü" Zhuanlan: Heli Fendan Chengben, Quanmian Tisheng Sifa Xiaolü ("司法效率" 专栏：合理分担司法成本，全面提升司法效率) [*A Special Column on "Judicial Efficiency": Distribute Judicial Costs Reasonably, and Comprehensively Improve Judicial Efficiency*], Renmin Fayuan Bao (人民法院报) [PEOPLE'S CT. DAILY], Dec. 8, 2010, at 5, *available at* http://www.court.gov.cn/fxyj/yjcgzs/201103/t20110304_15537.html, and also at Jiang Huiling (蒋惠岭), Sifa Xiaolü yu Sifa Chengben de Goucheng (司法效率与司法成本的构成) [*The Formation of Judicial Efficiency and Judicial Cost*], Renmin Fayuan Bao (人民法院报) [PEOPLE'S CT. DAILY], Dec. 1, 2010, at 8, *available at* http://www.court.gov.cn/fxyj/yjcgzs/201103/t20110304_15530.html.

discussed above, this initiative has roots in the Xiao Yang era but noticeably intensified after 2008. It traces its rhetorical origins to a 2000 speech by Xiao Yang, which stated that "fairness and efficiency" would be the main themes of legal reform in the new century.[106] When Xiao put forth the "justice for the people" slogan three years later, he explained that the slogan represented the foundation and starting point of "fairness and efficiency" and, therefore, that the two slogans were fundamentally interconnected.[107] One might see, for example, the various "access to justice" reforms discussed above also as attempts to boost judicial efficiency—once litigants were better informed, they probably would make better decisions and move the legal process along faster.

The most important measure in this "judicial efficiency" initiative so far has been the enhanced application of "summary procedure" in civil and criminal trials.[108] In 2003, the SPC issued an opinion on the application of such procedures in civil cases, while co-authoring, at roughly the same time, a separate opinion on criminal cases with the Supreme People's Procuratorate and Ministry of Justice.[109] While both civil and criminal procedure laws had recognized summary procedures since the mid-1990s, the statutory language was vague and hard to apply.[110] As Huang Songyou explained, by providing

[106] Zong Bian (宗边), Xiao Yang zai Bajisitan Fabiao Yanjiang: Weihu Sifa Gongzheng, Tigao Sifa Xiaolü (肖扬在巴基斯坦发表演讲：维护司法公正，提高司法效率) [*Xiao Yang Speaks in Pakistan: Protect Judicial Fairness, Enhance Judicial Efficiency*], Renmin Fayuan Bao (人民法院报) [PEOPLE'S CT. DAILY], June 19, 2001, *available at* http://oldfyb.chinacourt.org/public/detail.php?id=24975.

[107] Fan & Li, *supra* note 59.

[108] SPC higher-ups have explicitly stated this. Jiang Huiling, *supra* note 105. Some scholars have identified other measures in the efficiency program, including administrative emphasis on statutory deadlines for normal civil procedure, annual case-completion rates, and appeals rates for local adjudication. *See* Fu & Cullen, *supra* note 6, at 46–49. These measures focus, however, only on the handling of *regular* civil procedure, and are therefore less drastic "efficiency" measures than the push for summary procedure discussed here.

[109] Guanyu Shiyong Jianyi Chengxu Shenli Minshi Anjian de Ruogan Guiding (关于适用简易程序审理民事案件的若干规定) [Several Regulations Concerning the Application of Summary Procedure to Civil Cases] (promulgated by the Sup. People's Ct., Sept. 10, 2003, effective Dec. 1, 2003) SUP. PEOPLE'S CT. GAZ., May 1, 2003, at 9 [hereinafter Application of Summary Procedure to Civil Cases], *available at* http://www.law-lib.com/law/law_view.asp?id=80973; Guanyu Shiyong Jianyi Chengxu Shenli Gongsu Anjian de Ruogan Guiding (关于适用简易程序审理公诉案件的若干规定) [Several Regulations Concerning the Application of Summary Procedure to Criminal Cases] (promulgated by Sup. People's Ct., Sup. People's Proc., and Ministry of Justice, Mar. 14, 2003, effective Mar. 14, 2003), SUP. PEOPLE'S CT. GAZ., Feb. 1, 2003, at 21 [hereinafter Application of Summary Procedure to Criminal Cases], *available at* http://www.law-lib.com/law/law_view.asp?id=42942.

[110] Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. of the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Apr. 1, 2008) §§ 142–146, 1991 SUP. PEOPLE'S CT. GAZ. 3 [hereinafter Civil Procedure Law of 1991]

detailed guidelines on when and how to apply summary procedure, the opinions enhanced its availability to litigants.[111]

The primary difference between summary and regular civil procedure was that the former must generally conclude within three months, whereas the latter could take six.[112] To this end, summary procedure generally allowed for only one hearing before judgment, excluded the use of three-judge adjudication panels, and relaxed certain procedural requirements for motion filing, evidence presentation, and debate.[113] The application of summary procedure in criminal cases had largely similar effects, but it placed the deadline for case conclusion at twenty days.[114] There were, of course, restrictions on when summary procedure could be used. In civil cases, both sides needed to consent to the procedure and agree on the basic facts.[115] In criminal cases, summary procedure required the consent of the prosecutor, a "simple and clear" fact pattern, a guilty plea, and a charge that carried no more than three years imprisonment.[116]

There is nothing controversial about these rules. Taken at face value, they provide the option of simplifying trial procedure when there is little factual ambiguity. For most of the 2000s, there was no indication that judges were applying summary procedure unfairly or coercively. Indeed, application of summary procedure by local courts increased only modestly after 2003.[117]

Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by the Standing Comm. of the Nat'l People's Cong., Mar. 17, 1996, effective Mar. 17, 1996), §§ 174–179, 1996 SUP. PEOPLE'S CT. GAZ. 39 [hereinafter Criminal Procedure Law of 1996].

[111] Tian Yu (田雨), Zuigao Fayuan Gongbu Minshi Anjian Shiyong Jianyi Chengxu Sifa Jieshi (最高法院公布民事案件适用简易程序司法解释) [*The Supreme Court Issues a Judicial Interpretation Concerning the Application of Summary Procedure to Civil Cases*], Xinhua Wang (新华网) [XINHUA NET] (Sept. 19, 2003, 10:04 PM), http://news.xinhuanet.com/newscenter/2003-09/18/content_1088684.htm.

[112] Civil Procedure Law of 1991, *supra* note 110, at §§ 135, 146. These were the statutory rules in effect at the time of the SPC interpretations on summary procedure, which were later replaced in 2008—with no change to the time limits—by the 2008 amendments to the Civil Procedure Law. Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) §§ 135, 146, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 702.

[113] Civil Procedure Law of 1991, *supra* note 110, at §§ 143–145; Application of Summary Procedure to Civil Cases, *supra* note 109, at §§ 4–12, 21, 23, 27.

[114] Criminal Procedure Law of 1991, *supra* note 110, at §§ 147–149, 178; Application of Summary Procedure to Criminal Cases, *supra* note 109, at §§ 5, 7.

[115] Application of Summary Procedure to Civil Cases, *supra* note 109, at § 1.

[116] Application of Summary Procedure to Criminal Cases, *supra* note 109, at § 1.

[117] According to Tian Yu & Zhang Xiaojing (田雨 & 张晓晶), Quanguo Jiceng Fayuan 60% Anjian Shiyong Jianyi Chengxu Kuai Shen Kuai Pan (全国基层法院 60%案件适用简易程

In 2008, however, the SPC began to increase pressure on local courts to apply summary procedure as often as possible. Early that year, it issued an experimental set of guidelines designed to formalize the internal review of judicial performance.[118] Most prominently, the guidelines laid out thirty-three statistical "indicators" that lower courts should use to evaluate and guide the work performance of their judges—basically, establishing "target levels" for each statistic and rewarding or reprimanding judges, often financially, based on their success or failure at meeting those targets.[119] These included not only indicators on the percentage of cases appealed, overturned, mediated, and withdrawn, but also eleven indicators of "judicial efficiency" that look at, for example, the percentage of cases closed within proper time limits, the average duration of each case, and the percentage of cases that used summary procedure.[120]

The SPC then solidified these "experimental" measures in 2010 by establishing an annual national review procedure, in which all lower courts received evaluations and rankings based on statistical indicators.[121] These evaluations introduced a mathematical formula based on twenty-six indicators—the other seven were presumably eliminated—and assigned "weights" to each indicator.[122] This provided a statistical foundation for

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序快审快判) [*60% of Cases in Local Courts Applied Summary Procedure to Adjudicate Swiftly*], Zhongguo Falü Jiaoyu Wang (中国法律教育网) [CHINA LEGAL EDUC. NET] (July 2, 2004), http://www.chinalawedu.com/news/1000/3/2004/7/he0834243834127400215684 2_121965.htm, 60% of local cases applied summary procedure, including both civil and criminal cases. This meant that well over 60% of civil cases applied summary procedure, as the rate is generally much lower for criminal cases—according to Xiao Yang (肖扬), Zuigao Renmin Fayuan Gongzuo Baogao (2007) (最高人民法院工作报告 [2007]) [Supreme People's Court Work Report (2007)], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Mar. 30, 2007, at 370 [hereinafter Xiao, SPC Work Report 2007], *available at* http://www.gov.cn/2007lh/content_556959.htm (delivered at the 5th plenary session of the 10th National People's Congress on Mar. 13, 2007), the application rates had "increased" to around 70% for civil cases and around 40% for criminal cases. The increase must have been marginal.

[118] Guanyu Kaizhan Anjian Zhiliang Pingbu Gongzuo de Zhidao Yijian (Shixing) (关于开展案件质量评估工作的指导意见[试行]) [Guiding Opinion on the Initiation of Case Quality Evaluations (Trial Implementation)] (promulgated by the Sup. People's Ct., Jan. 11, 2008, effective Jan. 11, 2008), SUP. PEOPLE'S CT. GAZ., Mar. 1, 2008, at 13, *available at* http://china.findlaw.cn/info/minshang/minfa/minfafagui/sifajieshi/62500.html.

[119] *Id.* at §§ 8–10.

[120] *Id.*

[121] Jiedu Zuigao Fayuan "26 Xiang Zhibiao" (解读最高法院"26 项指标") [*Interpreting the "26 Indicators" Issued by the Supreme Court*], Shijiazhuang Shi Yuhua Qu Renmin Fayuan Wang (石家庄市雨花区人民法院网) [PEOPLE'S CT. OF YUHUA DISTRICT, SHIJIAZHUANG NET], http://www.yhqfy.com/show.asp?id=178 (last visited Dec. 24, 2011).

[122] *Id.*

national rankings and comparisons. Within this new system, the percentage of cases that applied summary procedure and the percentage that issued verdicts immediately after the initial hearing occupied counterintuitively heavy weights: 8% and 6%, respectively, of the total "score."[123] By comparison, the percentage of cases appealed and overturned each only weighed 3%.[124] And despite the public exposure that mediation and "justice for the people" have recently received, the percentage of cases mediated only weighed 5%.[125] The introduction of this review system triggered a flurry of action in lower courts, as administrators scrambled to put together appropriate "target levels" for the designated indicators, conduct internal reviews, and boost corresponding performance levels.[126]

Although lower courts had long used a variety of statistical indicators to measure judicial performance, prior to 2008, the SPC had rarely explicitly endorsed the establishment of what some have called "target responsibility systems."[127] Quite the opposite, in the late 1990s and early 2000s, it would sometimes caution lower courts against abuse of performance indicators "in violation of judicial fairness."[128] Moreover, even among lower courts, the use of summary procedure was rarely emphasized as a key measure of positive performance, unlike, for example, the percentage of cases adjudicated in court or, since at least 2003, the percentage of cases mediated.[129]

By designating the application of summary procedure as a key measure of judicial performance, the SPC created significant pressure on local courts to simplify case processing whenever possible. A relatively benign interpretation of these developments would be that they were simply rational reactions to some pressing necessity: perhaps many cases that followed regular procedure were actually too simple to justify it. It seems unclear, however, whether the SPC actually has any real grounds to make this assessment. Due to the limited availability of judicial appeal in China, the SPC relies predominantly on research projects to monitor local adjudication, but there has apparently been no concentrated effort in recent years to study the application of summary procedure.[130]

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Carl F. Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INT'L. L. 53 (2009).

[128] *See* sources cited at *supra* note 63; Fu & Cullen, *supra* note 6, at 49–51 (noting how the SPC "was critical" of certain statistical performance indicators and was "challenging" their use).

[129] Minzner, *supra* note 4, at 33–34.

[130] Email from the research staff of Institute of Applied Legal Studies (March 1, 2011, 4:10 EST) (on file with author).

As far as prima facie evidence goes, a 70% application rate in civil cases and a 40% rate in criminal trials hardly seem low.[131] These rates arguably reflect a considerable effort by judges—who have their own incentive to lighten their workload—to encourage simplified procedure. A few Chinese scholars and judges have attempted to compare these numbers to the use of simplified legal procedures in Western courts, arguing that Chinese usage of summary procedure is dramatically lower than in "developed countries."[132] These discussions, however, come with little academic rigor: one paper even compares the use of summary procedure in criminal cases to American plea-bargaining.[133] If one only looks at the average length of cases, i.e., the time between the initial filing of claims to the final conclusion, then Chinese courts actually compare favorably to most Western jurisdictions. Moreover, according to a 2002 study by the World Bank, Chinese processing of civil claims was faster than nearly all Western European nations even before the 2003 SPC opinion encouraging the use of summary procedure, with the exception being the United Kingdom.[134] In the end, there does not seem to be much reason for the SPC to believe that regular trial procedures were being used "wastefully."

Alternatively, the SPC might have believed that the total volume of litigation in China was rising too rapidly for local courts to continue applying regular procedure as often as they used to. Chinese judges have regularly complained about rising caseloads for years.[135] Prior to 2007, the total caseload

[131] *See supra* note 117.

[132] *E.g.*, Song Zhaowu (宋朝武), Minshi Susong Jianyi Chengxu Bijiao Yanjiu (民事诉讼简易程序比较研究) [*A Comparative Study of Civil Summary Procedures*], Renmin Sifa (人民司法) [People's Judicature], no. 8, 2003, at 62, *available at* http://www.civillaw.com.cn/article/default.asp?id=51454; Xie Xiaojian (谢小剑), Bijiao Fa Shiye xia de Xingshi Jianyi Chengxu (比较法视野下的刑事简易程序) [*Summary Criminal Procedure Under a Comparative Law Perspective*], Jiangxi Caijing Daxue Xuebao (江西财经大学学报) [J. JIANGXI UNIV. FIN. & ECON.], no. 1, 2008, at 97; Wang Guoshu & Xiang Zhenhua (王国枢 & 项振华), Zhongwai Xingshi Susong Jianyi Chengxu ji Bijiao (中外刑事诉讼简易程序及比较) [*A Comparison of Summary Criminal Procedures in China and Foreign Jurisdictions*], Zhongguo Faxue (中国法学) [CHINA LEGAL SCI.], no. 3, 1999, at 143.

[133] Xie, *supra* note 132.

[134] Simeon Danjkov et al., *Courts: The Lex Mundi Project*, 48–51 (National Bureau of Economic Research, Working Paper No. 8890, 2002), *available at* http://www.lexmundi.com/images/lexmundi/PDF/courts_nber1.pdf?SnID=2 (comparing the processing speed of basic civil disputes across different nations).

[135] Liebman, *supra* note 5, at 4–5; Yan Maokun (颜茂昆), Xiao Yang zai Meiguo Yelu Daxue Fabiao Yanjiang Zhongguo Sifa: Tiaozhan yu Gaige (肖扬在美国耶鲁大学发表演讲: 中国司法挑战与改革) [*Xiao Yang Gives Speech at Yale University on China's Judiciary: Challenges and Reforms*], Renmin Fayuan Bao (人民法院报) [PEOPLE'S CT. DAILY], Oct.12, 2004, at 1–2, *available at* http://www.chinacourt.org/html/article/200410/12/134381.shtml; Sun Huili (孙慧丽), Beijing Susong Shuliang Baozhashi Zengchang Qunian 76% Anjian Weineng Jiean (北京诉讼数量爆炸式增长 去年76%案件未能结)

of the Chinese judiciary had hovered consistently at around 8 million cases for over five years.[136] This jumped to around 9 million in 2007, 10 million in 2008, and finally 11 million in 2009. In 2010, however, the trend reversed, with the total number of cases falling slightly.[137]

Nonetheless, a rising volume of litigation does not mean that Chinese courts are overstretched. Even in 2009, the average Chinese trial judge handled less than ninty cases a year.[138] Considering that it actually takes *less* time to process a case in China than in most Western nations, this figure seems relatively low: American trial judges routinely handle more than 400 cases a year, as do German criminal judges—German civil judges often take around 700.[139] Comparisons to other Asian jurisdictions are even starker: South Korean judges process over 700 cases each year, and Taiwanese civil

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[*The Number of Cases in Beijing Increases Explosively, the Percentage of Not Closed Cases Increased by 76% Last Year*], Fazhi Wanbao (法制晚报) [BEIJING LEGAL TIMES] (Apr. 27, 2005, 4:50PM), http://news.xinhuanet.com/legal/2005-04/27/content_2884636.htm.

[136] Liebman, *supra* note 5, at 6–7.

[137] Wang, SPC Work Report 2011, *supra* note 73; Wang Shengjun (王胜俊), Zuigao Renmin Fayuan Gongzuo Baogao (2010) (最高人民法院工作报告 [2010]) [Supreme People's Court Work Report (2010)], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Apr. 1, 2010, at 307, *available at* http://www.dffy.com/sifashijian/ziliao/201003/20100311163408.htm (delivered at the 3d plenary session of the 11th National People's Congress on Mar. 11, 2010); Wang, SPC Work Report 2009, *supra* note 69; Xiao Yang (肖扬), Zuigao Renmin Fayuan Gongzuo Baogao (2008) (最高人民法院工作报告 [2008]) [Supreme People's Court Work Report (2008)], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Mar. 31, 2008, at 370, *available at* http://www.gov.cn/2008lh/content_926191.htm (delivered at the first plenary session of the 11th National People's Congress on Mar. 10, 2008).

[138] Kui Kui (魁魁), Zhongguo Faguan de Renjun Jiean Shu Weishime Ruci Di? (中国法官的人均结案数为什么如此低?) [*Why Is the Average Caseload of Chinese Judges So Low?*], Zhang Jianbi Lüshi Boke (张剑弼律师博客) [LAWYER ZHANG JIANBI'S BLOG] (Jan. 28, 2011, 2:57 PM), http://blog.sina.com.cn/s/blog_6b96bec80100012c.html; Kui Kui (魁魁), Guowai Faguan Meinian Keyi Chuli Duoshao Jian Anjian? (国外法官每年可以处理多少件案件?) [*How Many Cases Can Foreign Judges Process Each Year?*], Dongfang Fayan (东方法眼) [E. LEGAL PERSP.] (Oct. 11, 2010, 3:01 PM), http://www.dffy.com/faxuejieti/zh/201011/20101111150202.htm; Liu Juanjuan (刘娟娟), Sifa Xiaolü yu Faguan Yuan E Zhidu zhi Bijiao Zhongsu (司法效率与法官员额制度之比较重塑) [*Comparison and Reconstruction of Judicial Efficiency and Court Personnel Quota System*], Shanghai Fayuan Wang (上海法院网) [SHANGHAI CT. NET] (Apr. 18, 2005), http://www.hshfy.sh.cn/shfy/gweb/xxnr.jsp?pa=aaWQ9MjgoNDEmeGg9MQPdcssPdcssz.

[139] Liu, *supra* note 138.

judges often receive over 2000 cases.[140] Certainly, the distribution of cases among Chinese local courts is highly uneven, but even the busiest courts only receive around 140 cases per judge.[141] These facts are fairly well-known, and legal scholars have frequently called for the judiciary to downsize, claiming that Chinese judges are severely *underworked*.[142]

Nor are there real grounds for the SPC to preemptively streamline judicial procedure in anticipation of future growth: the 2010 decline in caseload suggest that the 2007–2009 increases were a short-term shock, not the start of a long-term trend. The SPC itself seems to acknowledge this, blaming the recent increases on "the global financial crisis" rather than China's long-term economic growth.[143] Ultimately, the SPC has no good reason to aggressively push for further simplification of judicial procedure, especially when it potentially comes at the cost of fairness and accuracy.

Those costs could very well be hefty. In theory, litigants possess veto power over the application of summary procedure,[144] but one cannot help but expect judges to encourage it much more aggressively now that the new performance evaluation system looms constantly in the background. This is already noticeable in many local courts.[145] By rewarding or punishing judges

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[140] *Id.*; Cao Shibing (曹士兵), An Duo Ren Shao de Hanguo Fayuan (案多人少的韩国法院) [*Overworked Courts in Korea*], Renmin Sifa (人民司法) [PEOPLE'S JUDICIARY], no. 1, 2009, at 59.

[141] Kui Kui, *Why is the Average Caseload of Chinese Judges So Low?*, *supra* note 138.

[142] *Id.* For a Western perspective on the extremely large size of the Chinese judiciary, see Jerome A. Cohen, *The Court of Mass Appeal*, S. CHINA MORNING POST, Apr. 4, 2009, at A11, *available at* http://www.cfr.org/china/court-mass-appeal/p19117.

[143] *See* sources at *supra* note 137.

[144] Application of Summary Procedure to Civil Cases, *supra* note 109, at § 1 (requiring consent from all litigants); Application of Summary Procedure to Criminal Cases, *supra* note 109, at § 1 (requiring a voluntary guilty plea).

[145] A simple Google search for "简易程序适用率" (*jianyi chengxu shiyong lü*) (application rates for summary procedure) reveals that many local courts have recently stepped up institutional measures to increase the usage of summary procedure, and often report—with more than a hint of self-satisfaction—increasing rates. *See, e.g.*, Tiaojie, Chesu Zhan Jiean Zongshu Liu Cheng Jianyi Chengxu Shiyong Lü Chaoguo 86% (调解、撤诉占结案总数六成 简易程序适用率超过 86%) [*Mediated and Withdrawn Cases Reach 60%; Summary Procedure Applied in Over 86% of Cases*], Wangyi Xinwen (网易新闻) [NETEASE NEWS] (Mar. 19, 2010, 5:08 PM), http://news.163.com/10/0319/17/625FB0KR000146BC.html (reporting statistics from Chongming District, Shanghai); Quanshi Renmin Fating Jianyi Chengxu Shiyong Lü Da 85.3% (全市人民法庭简易程序适用率达 85.3%) [*The Application of Summary Procedure in the Municipal People's Courts Reaches 85.3%*], Zhongguo Jiaxing (中国嘉兴) [CHINA JIAXING] (June 3, 2010, 4:32 PM), http://www.jiaxing.gov.cn/art/2010/6/3/art_131_27846.html; Qianghua Guanli Tigao Minshi Shenpan Gongzuo Zhiliang (强化管理 提高民事审判工作质量) [*Strengthen Management, Increase the Quality of Civil Adjudiciation*], Jiutai Shi Renmin Fayuan (九台市人民法院) [JIUTAI CITY PEOPLE'S CT.] (Apr. 28, 2011, 8:46 PM),

based on their summary procedure application rates, the evaluation system will very likely create a "race to the top"—or "race to the bottom," depending on one's point of view—to apply summary procedure. The potential for coercion is enormous.[146] Given the relative lack of legal representation in China,[147] many litigants turn to court personnel for basic legal advice.[148] Judges therefore wield tremendous influence over procedural choices. It is hardly far-fetched to expect that many of them will now insistently recommend procedural simplicity even when the case deserves a more drawn-out and detailed treatment and that many, if not most, litigants will be in no position to resist or even to fully comprehend the problem.

If the establishment of judicial performance indicators do not respond to any pressing necessity, is it nonetheless possible that they derive from some overarching ideological commitment, perhaps to either legal professionalism or populism? This, too, seems unlikely. Putting strong institutional pressure on judges to apply summary procedure is almost certainly inconsistent with legal professionalism, especially when there is no decent evidence that Chinese judges are overworked. Such pressure only prevents judges from approaching the selection of procedure with an open mind, diverting their attention from the accurate and appropriate application of legal rules. Ironically, the performance indicators also run afoul of legal populism: they intuitively make judges less sensitive, not more, to public opinion and the specific needs of litigants. By giving judges substantial incentive to push for

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http://jtfy.org/news/Show.php?id=335; Fengxian Fayuan 2009 Niandu Xianjin Qunti Fengcai Lu (奉贤法院 2009 年度先进群体风采录) [*Personal Profiles of Exemplary Judges, Fengxian Court, 2009*], Shanghai Shi Fengxian Qu Renmin Fayuan (上海市奉贤区人民法院) [SHANGHAI FENGXIAN DISTRICT CT.] (Jan. 28, 2011), http://www.fxfy.sh.cn/fxfyww/pages/CzArticle/detail.do?articleId=1821 (praising certain judges for their high summary procedure application rates).

[146] Similar arguments have been made by Minzner, *supra* note 4, at 37-43, on the use of "target responsibility systems" to promote mediation, but his major criticisms—generally that it makes the choosing of procedural modes coercive and unresponsive to popular social needs—also apply to the promotion of summary procedure via similar methods.

[147] *See* Zhang Zhiming (张志铭), Lüshi de Shuliang yu Fenbu (律师的数量与分布) [*The Number and Distribution of Lawyers*], Zhongguo Lüshi Zhiye Falü Wang (中国律师执业法律网) [CHINA LAWYERING L. NET] (Nov. 11, 2006), http://www.china-lawyering.com/main/list.asp?unid=1021.

[148] Courts are actually obligated to provide basic legal counsel to litigants, which certainly reflects the judiciary's own grasp of the legal representation system: Guanyu Jin Yi Bu Jiaqiang Sifa Bianmin Gongzuo de Ruogan Yijian (关于进一步加强司法便民工作的若干意见) [Several Opinions Concerning the Provision of Convenient Justice to the People] (promulgated by the Sup. People's Ct, Feb. 24, 2009, effective Feb. 24, 2009) § 1, SUP. PEOPLE'S CT. GAZ., May 1, 2009, at 5, *available at* http://www.court.gov.cn/qwfb/sfwj/yj/201002/t20100224_1906.htm.

summary procedure almost regardless of circumstance, the indicators significantly damage the normative flexibility that legal populism so fervently advocates.

Nor is it very plausible to view the indicators as the result of pressure from Party leaders. It is hard to believe that they would have much interest in exerting pressure on this kind of procedural detail. The push towards summary procedure generates no clear benefit for either the Party-state's control over the judiciary or for the maintenance of social stability. Quite the opposite, it actually contradicts, as discussed above, the Party's vocal support for the "justice for the people" initiative.

Having eliminated pressing necessity and ideological commitment, what is left to explain the SPC's recent infatuation with summary procedure? However theoretically pedestrian it may seem, the best explanation is simply the pragmatic pursuit of institutional self-interest, most notably financial health. Although the Chinese judiciary does not currently face any noticeable fiscal deficit, it suffers from a limited budget and a strong financial dependence on other branches of government.[149] It therefore has a clear incentive to conserve expenses, especially at a time of considerable financial uncertainty. Part of this uncertainty stems from the broader financial problems of the Chinese state: since at least the 2008 financial crisis, it has been running significant budget deficits that some estimate to be over 15 percent of GDP in 2009.[150] Amid concerns about the housing market, high inflation, and "over-investment,"[151] the central government has planned to slow the expansion of government debt, while local governments face even tougher fiscal decisions.[152]

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[149] *See* He, *supra* note 43; Wang Yaxin (王亚新), Sifa Chengben yu Xifa Xiaolü: Zhongguo Fayuan de Caizheng Baozhang yu Faguan Jili (司法成本与司法效率: 中国法院的财政保障与法官激励) [*Judicial Cost and Efficiency: The Securing of Finances and the Motivation of Judges in China's Courts*], Faxuejia (法学家) [LEGAL SCHOLAR], no. 4, 2010, at 132, *available at* http://www.civillaw.com.cn/article/default.asp?id=51198; Su Yongqin (苏永钦), Sifa Xingzheng Zuzhi de Fazhan Qushi: Cong Shenpan Duli yu Guojia Geifu Sifa Yiwu de Jinzhang Guanxi Tan Qi (司法行政组织的发展趋势: 从审判独立与国家给付司法义务的紧张关系谈起) [*Development Trends in the Administrative Organization of the Judiciary: Starting from the Tense Relationship Between Judicial Independence and the State's Obligation to Financially Support the Judiciary*], *in* Fazhi yu Xiandai Xingzheng Faxue (法治与现代行政法学) [THE RULE OF LAW AND MODERN ADMINISTRATIVE LEGAL STUDIES] 45 (Yuanzhao Chubanshe [元照出版社] [Yuanzhao Press] ed., 2004).

[150] *See, e.g.*, *China's State Deficit Is Tip of Iceberg*, REUTERS BREAKINGVIEWS (Mar. 3, 2010, 5:19 PM), http://blogs.reuters.com/columns/2010/03/03/chinas-state-budget-deficit-is-tip-of-iceberg (discussing local government debts); Olivia Chung, *China's Local Debts Threaten Crisis*, ASIA TIMES ONLINE (July 14, 2010), http://www.atimes.com/atimes/China_Business/LG14Cb02.html.

[151] *See* John Gapper, *China's Over-Investment Is Its Achilles Heel*, FIN. TIMES BUS. BLOG, (Nov. 30, 2009, 2:38 AM), http://blogs.ft.com/businessblog/2009/11/chinas-over-investment-is-its-achilles-heel.

[152] Jason Sublet, *China Targets Budget Deficit of 2 Percent of GDP in 2011*, REUTERS (Mar. 5, 2011, 3:59 AM), http://www.reuters.com/article/2011/03/05/china-economy-budget-

Although the courts occupy only a miniscule portion of the overall budget, [153] their relative political weakness nonetheless makes them particularly vulnerable to spending cuts, especially by local governments. Recent structural changes to judicial funding have further aggravated this vulnerability. Starting in 2007, courts began to slash litigation fees as part of the "justice for the people" initiative, creating a substantial gap in the judicial budget.[154] Although the central government pledged to fill it through various special subsidies, distributed to the courts via provincial and local governments, coordination proved complicated and costly.[155] The judiciary lost a considerable amount of financial independence in this process.

The push for summary procedure does, at the very least, advance the judiciary's financial interests by saving time and resources devoted to individual cases. Theoretically, quicker processing of cases might encourage heavier use of courts, but the judiciary's past experience suggests otherwise: the more frequent use of summary procedure after 2003, for example, did not generate any significant growth in caseload. There is, therefore, much financial upside and little downside to streamlining case procedure as much as possible.

Financial security has featured prominently in the SPC's recent policy agenda, often in conjunction with various "judicial efficiency" measures. One noticeable difference between the SPC's Third Five-Year Plan and its previous two was that "strengthening the financial security of people's courts" became an official priority: courts should collaborate with other branches of government to normalize the approval and "regular increase" of judicial budgets and ensure a greater measure of financial security. [156] Shortly afterwards, the connection between financial security and streamlining case procedure was made in numerous statements and discussions concerning the SPC's recent "judicial cost and efficiency" project.[157]

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idUSTOE72401020110305 (noting that planned deficit growth for the central government is down to 2% of GDP, from 2.5% in 2010, and that local governments could face greater income shortages).

[153] In 2006, for example, the judiciary had a budget of 20 billion yuan total. 2009 Nian Sifa Tizhi Gaige Xin Fangan (2009 年司法体制改革新方案) [*2009 Agenda for Judicial Institutional Reform*], Jiaoyu Cheng (教育城) [EDUC. CITY] (Mar. 16, 2009, 2:07 PM), http://www.12edu.cn/zuowen/chfa/200903/251912.shtml. The fiscal deficit of the central government alone was 274 billion yuan in 2006. *Government To Cut 2007 Budget Deficit*, CHINA DAILY (Mar. 5, 2007, 1:38 PM), http://www.chinadaily.com.cn/bizchina/2007-03/05/content_819804.htm.

[154] Wang, *supra* note 149.

[155] *Id.*

[156] Third Five Year Plan, *supra* note 72, at §§ 2.22–2.24.

[157] *See, e.g.*, Jiang, *supra* note 105 (discussing the "economic accounting" that "judicial efficiency" demands); Gu, *supra* note 105; Zuigao Renmin Fayuan Yingyong Yanjiusuo (最高人民法院应用法学研究所) [Institute of Applied Legal Studies of the Sup. People's Ct.], Anli Zhidao Zhidu yu "Sifa Chengben yu Sifa Xiaolü" Yantaohui: Huiyi Lunwen

This project was initiated in 2008 by the Court's Institute for Applied Legal Studies (IALS) and has yet to reach a conclusion.[158] Thus far, the IALS has hosted three conferences, attended by a combination of SPC staff, lower court judges, and academics in related fields. In both of the past two conferences, SPC representatives and scholars have repeatedly highlighted the connection between judicial efficiency and the financial health of courts, arguing that their long-term financial security very much depends on more efficient processing of cases.[159] This sets the tone for discussion on more specific measures, such as the potential establishment of small-claims courts and broader application of summary procedure.[160] The title of the project itself, of course, explicitly links the pursuit of "efficiency" with the cutting of "costs."

The best explanation for the SPC's recent promotion of "judicial efficiency" and the ensuing emphasis on summary procedure is, therefore, straightforward financial self-interest. This is, moreover, a rather strong and forward-looking form of institutional pragmatism that does not merely react passively to necessity, but also attempts to preempt latent problems even in the absence of immediate need. As noted above, there is no strong argument that Chinese courts face a scarcity of human or financial resources, nor is there evidence that they either apply regular procedure more often than is appropriate or that the Party leadership has applied pressure on these issues.[161] Instead, the SPC seems to be planning strategically for its long-term financial security. The fact that these far-reaching policies actually do substantial damage to both professionalism *and* legal populism casts doubt upon the SPC's commitment to either ideal.

Huizong (2010 Nian 11 Yue, Jilin Changyi) (案例指导制度与"司法成本与司法效率"研讨会: 会议论文汇总 [2010 年 11 月，吉林昌邑]) [Conference on the Guiding Cases system and "Judicial Cost and Judicial Efficiency": Conference Paper Collection (November 2010, Jilin Province, Changyi)] 2–7 (Mar. 2010) [hereinafter Changyi Conference Papers] (on file with author); Zuigao Renmin Fayuan Yingyong Yanjiusuo (最高人民法院应用法学研究所) [Institute of Applied Legal Studies of the Sup. People's Ct.], Sifa Chengben yu Sifa Xiaolü Yantaohui: Huiyi Lunwen Huizong (2009 Nian 7 Yue, Gansu Zhangye) (司法成本与司法效率研讨会: 会议论文汇总 [2009 年 7 月，甘肃张掖]) [Conference on Judicial Cost and Judicial Efficiency: Conference Paper Collection (July 2009, Gansu Province, Zhangye)] 51–57, 66–72, 98–103 (2009) [hereinafter Zhangye Conference Papers] (on file with author).

[158] Jiang, *supra* note 105; Gu, *supra* note 105.

[159] *See* sources at *supra* note 157.

[160] Changyi Conference Papers, supra note 149, at i–ii (laying out the conference schedule); Zhangye Conference Papers, supra note 149, at i–ii (laying out conference schedule).

[161] *See supra* pp. 29–31.

B. Recent Developments in Marriage Law

The push towards greater "judicial efficiency" has influenced not only procedural issues, but also the SPC's interpretation of substantive law. Recent developments on this front hint at a willingness to promote simplicity and clarity even when the broader socioeconomic costs arguably outweigh the benefits. The best-known example—largely due to the subject's sensitivity—has been the SPC's drafting of the Third Judicial Interpretation of the Marriage Law,[162] which has triggered heated public discussion since a draft was released for public comment in late 2010.

Since the ratification of China's current marriage law in 1980,[163] the SPC has issued two formal interpretations, clarifying various issues concerning registration, divorce procedures, and marital property.[164] As economic and social conditions changed, however, new problems concerning extramarital affairs, divorce, and the division of property began to emerge, intensifying the pressure for further judicial interpretation.[165] In response, the SPC began work on the third interpretation in 2007 and, by 2009, had put together a preliminary draft that was not publically released.[166] After a few delays, it

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[162] Zuigao Fayuan Hunyin Fa Sifa Jieshi Zhengqiu Yijian (最高法院婚姻法司法解释征求意见) [*The Supreme Court Seeks Comments on Judicial Interpretation of the Marriage Law*], Renmin Fayuan Bao (人民法院报) [PEOPLE'S CT. DAILY], Nov. 16, 2010, at 1 [hereinafter *SPC Seeks Comments on Marriage Law*], *available at* http://www.lawtime.cn/info/hunyin/hunyinfagui/20111013157909.html.

[163] Hunyin Fa (婚姻法) [Marriage Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981, amended Apr. 28, 2001) [hereinafter Marriage Law of 1981], *available at* http://www.pkulaw.cn/fulltext_form.aspx?Gid=797.

[164] Guanyu Shiyong "Zhonghua Renmin Gongheguo Hunyin Fa" Ruogan Wenti de Jieshi (Er) (关于适用《中华人民共和国婚姻法》若干问题的解释[二]) [Interpretations Concerning Several Questions on the Marriage Law of the People's Republic of China (Part Two)] (promulgated by the Sup. People's Ct., Dec. 26, 2003, effective Apr. 1, 2004) SUP. PEOPLE'S CT. GAZ., Jan. 10, 2004, at 14, *available at* http://www.law-lib.com/law/law_view.asp?id=81887; Guanyu Shiyong "Zhonghua Renmin Gongheguo Hunyin Fa" Ruogan Wenti de Jieshi (Yi) (关于适用《中华人民共和国婚姻法》若干问题的解释[一]) [Interpretations Concerning Several Questions on the Marriage Law of the People's Republic of China (Part One)] (promulgated by the Sup. People's Ct., Dec. 25, 2001, effective Dec. 25, 2001) SUP. PEOPLE'S CT. GAZ., Jan. 1, 2002, at 13, *available at* http://www.law-lib.com/law/law_view.asp?id=16795.

[165] "Dangdai Zhongguo de Jiating Guannian yu Hunyin Anquan" Yantaohui (Buchong Cailiao) ("当代中国的家庭观念与婚姻安全"研讨会[补充材料]) [ADDITIONAL CONFERENCE MATERIALS FOR THE SEMINAR ON THE "THE CONCEPT OF FAMILY AND THE SECURITY OF MARRIAGE IN CONTEMPORARY CHINA"] 1 (Beijing Daxue Fazhi Yanjiu Zhongxin [北京大学法治研究中心] [Peking Univ. Research Center on the Rule of Law] et al. eds., 2010) [hereinafter ADDITIONAL CONFERENCE MATERIALS ON FAMILY AND MARRIAGE] (on file with author).

[166] Its contents did, however, leak out onto the internet, probably via scholars who had access to the SPC's drafting processsee. *See, e.g.*, Hunyin Fa Sifa Jieshi (San) (婚姻法司

finally released a formal draft at the 2010 meeting of the Association of Marriage Law, seeking comments from experts in the field.[167] Immediately afterwards, it made some changes and distributed the revised draft for public comment on November 16.[168]

One of the most controversial aspects of this draft was that it placed significant restrictions on the scope of marital property. First, courts would consider any appreciation in value of individual property to be individual property unless the other spouse proves that he or she contributed to the appreciation.[169] Even then, the language of the draft suggests that courts would have discretion to determine whether to categorize the appreciation as marital property. In contrast, previous judicial interpretations were silent on the issue of passive appreciation but clearly stated that any returns from the investment of individual property should be considered martial property.[170] Second, courts would consider any real estate, given post-marriage to one spouse by his or her parents and registered under his or her name, to be individual property.[171] The previous rule was that post-marriage gifts of real property by parents should be considered marital property unless the parents explicitly declared otherwise.[172] The new draft essentially established that registration under one spouse's name would constitute an explicit declaration of intent. Third, courts would consider any real estate purchased and registered, prior to marriage, under the name of one spouse to be individual property, provided that he or

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法解释[三]草案) [*Third Judicial Interpretation on the Marriage Law, Draft*], 法律时空 [LEGAL TIME & SPACE] (May 25, 2009, 6:04 PM), http://hi.baidu.com/falvshiwu/blog/item/e8e1cdecfecfd34778f055ab.html/cmtid/6be6f5cff2e5370992457e5a.

[167] Beijing Daxue Fazhi Yanjiu Zhongxin (北京大学法治研究中心) [Peking Univ. Research Center on the Rule of Law], "Dangdai Zhongguo de Jiating Guannian yu Hunyin Anquan" Yantaohui (Huiyi Zongshu) ("当代中国的家庭观念与婚姻安全"研讨会[会议综述]) [*Summary of the Seminar on the "The Concept of Family and the Security of Marriage in Contemporary China"*] 3 (2010) [*hereinafter Seminar Summary on Family and Marriage*] (on file with author). This was not, of course, the first time the SPC had sought academic commentary on this interpretation. *See* "Dangdai Zhongguo de Jiating Guannian yu Hunyin Anquan" Yantaohui (Huiyi Cailiao) ("当代中国的家庭观念与婚姻安全"研讨会[会议材料)] [CONFERENCE MATERIALS FOR THE SEMINAR ON THE "THE CONCEPT OF FAMILY AND THE SECURITY OF MARRIAGE IN CONTEMPORARY CHINA"] 5–10 (Beijing Daxue Fazhi Yanjiu Zhongxin [北京大学法治研究中心] [Peking Univ. Research Center on the Rule of Law] et al. eds., 2010) [hereinafter CONFERENCE MATERIALS ON FAMILY AND MARRIAGE] (on file with author).

[168] *SPC Seeks Comments on Marriage Law*, *supra* note 162

[169] *Id.* at § 6.

[170] *Interpretations Concerning Several Questions on the Marriage Law of the People's Republic of China (Part Two)*, *supra* note 164, at § 11.1.

[171] *SPC Seeks Comments on Marriage Law*, *supra* note 162, at § 8.

[172] Marriage Law of 1981, *supra* note 163, at §§ 17.4, 18.3.

she also paid the down payment.[173] If the other spouse contributed to mortgage payments after marriage, he or she may recover those payments, including any appreciation in value, but would still have no title in the property.[174] The new interpretations would apply to any divorce proceeding, regardless of the time of marriage.[175]

These measures drew fierce criticism upon their public release. A number of intellectuals that self-identified as "culturally conservative" lashed out at what they considered an attack on the institution of marriage. They argued that modern Chinese marriages relied heavily on marital property as a "binding force" within the family and that by limiting the scope of martial property, the SPC was weakening the durability of marriage.[176] First, dividing marital property is inherently complex and difficult, whereas designating items as individual property significantly simplifies the process of divorce.[177] Especially in the case of real estate, dividing jointly owned property is far more complicated than simply ensuring that each side receives half the total value. There are also numerous non-financial concerns to consider, such as living habits, psychological comfort levels, and so on.[178] By designating more real estate as individual, instead of marital, property, the SPC's draft interpretation would substantially lower the "transaction costs" of divorce for many households. Second, by labeling more types of property as "individual," the draft interpretation encourages spouses to think of themselves as "individuals," rather than as "part of a family."[179] Complaints against the "cultural invasion" of "Western individualism" often accompany such arguments.[180]

Dislike of the draft is not limited to "cultural conservatives." Some marriage law experts have also raised concerns on whether the new rules on individual property appreciation are consistent with "the general principles of Chinese marriage law," which supposedly assume that all property is marital property unless clearly stated otherwise.[181] Others have questioned whether the rules are equitable to women. They argue that it is customary in China for

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[173] *SPC Seeks Comments on Marriage Law*, *supra* note 162, at § 11.

[174] *Id.*

[175] *Id.* at § 21.

[176] *Seminar Summary on Family and Marriage*, *supra* note 167, at 4–6, 8–9, 11–14 (condemning the draft interpretation for weakening the institution of marriage by limiting the scope of marital property).

[177] *Id.* at 3–4, 10 (discussing the economic and social complexity of marital property).

[178] *Id.*

[179] *Id.* at 4–6 (discussing the interpretation's "assault on marriage").

[180] *Id.* at 11–14 (discussing the "Western" approach to marriage that dominates modern Chinese legal doctrine).

[181] ADDITIONAL CONFERENCE MATERIALS ON FAMILY AND MARRIAGE, *supra* note 165, at 1–2.

the groom or his family to purchase the newly-weds' first residence, while the bride's family provides furnishings and daily appliances of roughly equal value.[182] The underlying social presumption is that the spouses would share ownership of all items, and the new draft interpretation contradicts this by categorizing the residence as the groom's individual property.[183] While real estate generally appreciates in value with the passage of time, furnishings and appliances depreciate.[184] Thus, unless the real estate was registered under the bride's name or under joint ownership, the groom would enjoy a substantial economic advantage even when the initial monetary investment was largely equal for both spouses. And even if the new rules encourage newlyweds to take greater precautions when registering real estate, this does not justify applying them to marriages that predate their issuance, which the draft clearly intends to do.

This feeds into broader concerns over whether the draft interpretations exclude from "marital property" important items that are customarily understood to jointly owned, or at least complicated enough to warrant determination on a case-by-case basis. Considerable social ambiguity also surrounds, for example, post-marriage property conveyances by parents, who can be frustratingly vague in their intentions. Given these uncertainties, the SPC should, perhaps, be more cautious about artificially imposing uniform norms over socially complex issues.[185]

On one hand, these criticisms may exaggerate the actual socioeconomic effect of the draft interpretation: even if formally issued, the rules would only apply where the parties were unable reach a property division agreement among themselves.[186] More importantly, whether legal norms actually wield significant influence over social marriage practices is highly questionable, given the myriad of marriage customs that saturate local Chinese society. On the other hand, the criticisms do draw attention to the socioeconomic complexity of Chinese marriage practices and to the wide variety of unintended consequences that the draft interpretations may eventually have.

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[182] *Id.*; Yu Huaiqing (于怀清), Quanguo Fulian Zhaokai "Hunyin Fa Jieshi (San) Zhengqiu Yijian Gao" Zhuanjia Yantaohui (全国妇联召开"婚姻法解释[三]征求意见稿"专家研讨会) [*The National Women's Association Hosts an Expert Panel on the Public Comment Draft of the Third Interpretation of the Marriage Law*], Renmin Wang (人民网) [PEOPLE'S NET] (Dec. 13, 2010, 4:27 PM), http://acwf.people.com.cn/GB/13469508.html.

[183] ADDITIONAL CONFERENCE MATERIALS ON FAMILY AND MARRIAGE, *supra* note 165, at 1–2; Yu, *supra* note 182.

[184] ADDITIONAL CONFERENCE MATERIALS ON FAMILY AND MARRIAGE, *supra* note 165, at 1.

[185] *Seminar Summary on Family and Marriage*, *supra* note 167, at 3–4, 10.

[186] Hunyin Fa (婚姻法) [Marriage Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Apr. 28, 2001) § 39, 2001 STANDING COMM. NAT'L PEOPLE'S CONG. 330, *available at* http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=35339 (revising the original 1981 law).

The point here is not to evaluate any specific consequence, but to highlight the tremendous practical uncertainties that surround the draft interpretations.

The question, then, is why the SPC decided to establish uniform rules for social practices of such complexity. The SPC has issued only a vague statement that the draft interpretation was designed to "protect the stability of marriage, protect each individual's rights and freedoms, balance the interests of all family members, and balance the relationship between family and society."[187] Court officials were, however, more candid during several counseling sessions they requested from a group of marriage law experts: scholars returning from these sessions report that the officials were concerned, above all else, with simplifying and clarifying property division rules so that, should negotiation fail, the judge could issue a decision more swiftly and with less ambiguity.[188] In other words, they wanted to make the judiciary's job easier.

This explanation seems quite plausible. As noted above, by significantly compressing the scope of marital property, particularly real property, the draft interpretations eliminate the considerable complexity and uncertainty that marital property brings to the divorce process.[189] And apart from the convenience it brings to judges, the merits of eliminating this ambiguity are unclear. The criticisms discussed above call into question whether the new rules indeed "protect the stability of marriage" or are equitable to all family members. Several scholars who have been involved in the drafting process since at least 2009 have repeatedly voiced such concerns to the SPC,[190] but with no apparent effect.[191] This attracted further complaints that the SPC was overlooking broader socioeconomic consequences and express public

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[187] ADDITIONAL CONFERENCE MATERIALS ON FAMILY AND MARRIAGE, *supra* note 165, at 7 (reprinting statements at the Annual Meeting of the Marriage Law Association by Du Wanting, head of the First Civil Division, Supreme People's Court of China).

[188] *Seminar Summary on Family and Marriage*, *supra* note 166, at 3 (statement of Ma Yinan).

[189] *See* discussion surrounding *supra* notes 176, 177.

[190] CONFERENCE MATERIALS ON FAMILY AND MARRIAGE, *supra* note 167, at 5–10 (reporting expert commentary on an earlier draft).

[191] The designation of pre-marriage real estate purchases registered under one spouse's name as personal property, arguably *the* most controversial item in the draft interpretation, *Seminar Summary on Family and Marriage*, *supra* note 166, at 4 (noting that this item "attracted the most controversy"), existed at least as early as the 2009 leaked draft. *See Third Judicial Interpretation on the Marriage Law, Draft*, *supra* note 166, at § 13. A later draft, issued to experts in early 2010, kept this item and added the rule on gifts by parents. CONFERENCE MATERIALS ON FAMILY AND MARRIAGE, *supra* note 167, at 8, 9. Considering that the draft issued for public comment in November kept both these items while adding the rule on appreciation in value, it seems fair to say that the SPC's stance on compressing marital property has actually *strengthened* over time, despite the controversy it has been attracting.

disapproval in its single-minded pursuit of normative simplicity and judicial efficiency.[192]

There is, therefore, considerable reason to believe that the SPC's primary objective in pushing forth the new marriage law interpretations was the pursuit of doctrinal simplicity and judicial efficiency. It is unclear whether financial concerns were behind these objectives, although the draft interpretation certainly would speed up a significant number of divorce proceedings. More importantly, providing judges with a set of clear guidelines that limit the scope of marital property allows them to avoid entanglement with any number of practical complications commonly associated with the economic separation of a household. The ability to distance itself from socially complicated and emotionally charged disputes is probably just as valuable to the judiciary as the conservation of financial and human resources.[193]

The solicitation of public comments for the draft interpretation suggests the influence of populist concerns, but populism explains only the solicitation of comments and not the substantive content of the proposed draft. In fact, one could argue that the solicitation of comments was pragmatically designed to absorb public criticism and controversy before the interpretation's final publication.[194] While few would deny that recent SPC activity has displayed significant shades of populism, it seems questionable whether populist concerns actually influenced the Court's drafting of substantive legal rules. In this particular example, there is no logical connection between populism—or, for that matter, legal professionalism—and the doctrinal scope of marital

[192] *Seminar Summary on Family and Marriage*, *supra* note 167, at 2-4 (discussing scholarly responses to earlier drafts).

[193] This particular draft has been no slacker in this department, as the above discussion makes clear.

[194] While this is largely speculation, there are examples from the Chinese government's past use of public comment mechanisms in which controversy after the issuance of a draft seemed to exhaust public attention enough that the finalized documents, which kept nearly all the controversial items, did not attracted nearly as much attention. The most famous example is probably the controversy surrounding the 物权法 [Property Law] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. 291, *available at* http://www.gov.cn/flfg/2007-03/19/content_554452.htm. *See* Yu Zeyuan (于泽远), Qibai Duo Ming Ren Shangshu Hu Jintao, Zhi Moquan Fa Reng Weixian Ying Jiuzheng (七百多名人上书胡锦涛、指物权法仍违宪应纠正) [*Over 700 People Petition Hu Jintao, Arguing that the Property Law Remains Unconstitutional and Needs to Be Revised*], Lianhe Zaobao (联合早报) [LIANHE MORNING POST], Dec. 14, 2006, at 18, *available at* http://www.wyzxsx.com/Article/Class21/200612/12854.html. No comparable public outcry accompanied the issuance of the finalized legislation in 2007, even though it retained the same acknowledgment and protection of private property that critics had argued was unconstitutional.

property.[195] Here again, institutional self-interest seems to be the strongest motivation.

C. "Guiding Cases"

Although the Party leadership has seemingly strengthened its control over the judiciary in recent years, the SPC has by no means abandoned its pursuit of greater institutional authority. Quite the opposite, the recent establishment of the "guiding cases" system, which gives "guiding cases" approved by the Court stare decisis-like status, theoretically boosts its powers of judicial interpretation to unprecedented heights.[196] Compared to the developments discussed in the previous two sections, the issuance of "guiding cases" has a weaker connection with issues of substantive or procedural justice, but has far greater impact on the SPC's judicial authority. Correspondingly, it also throws its institutional ambitions into much sharper relief.

The establishment of the "guiding cases" system was, by Chinese legal standards, a very drawn-out affair. As early as 1985, the SPC had begun to identify "standard cases" (典型案例) (*dianxing anli*) via its official bulletin, although the binding force of these cases was unclear and, moreover, they almost never touched upon ambiguities or gaps in judicial doctrine.[197] Instead, the Court used them primarily as an advocacy tool for the correct application of well-established doctrine.[198] Not until the publication of its Second Five-Year Plan in 2005 did the creation of a "guiding cases" system become a formal policy objective.[199] Under this system, the SPC would select and publish "guiding cases" from lower court decisions, which would be explicitly binding

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[195] Scholars have argued that public opinion is quite against the compression of marital property, at least through these specific measures. *Seminar Summary on Family and Marriage*, *supra* note 167, at 3. A populist legal philosophy would therefore at least urge caution, whereas the SPC's desire to limit marital property has apparently strengthened throughout the drafting process. *See supra* note 191. On the other hand, legal professionalism, as defined in *supra* notes 36 and 37, simply demands that judges enforce legal rules objectively, without expressly commenting on the substance of those rules.

[196] Guanyu Anli Zhidao Gongzuo de Guiding (关于案例指导工作的规定) [*Regulations on Guiding Cases*] (promulgated by the Sup. People's Ct., Nov. 26, 2010, effective Nov. 26, 2010) (Chinalawinfo), *available at* http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=143870.

[197] Li Shichun (李仕春), Anli Zhidao Zhidu de Ling Yi Tiao Silu—Sifa Neng Dong Zhuyi zai Zhongguo de Youxian Shiyong (案例指导制度的另一条思路—司法能动主义在中国的有限适用) [*An Alternative Path for the Guiding Cases System—The Limited Applicability of Judicial Activism to China*], Faxue (法学) [LEGAL STUDY], no.6, 2009, at 59, 61–62, *available at* http://wenku.baidu.com/view/50ed92c5aa00b52acfc7ca21.html.

[198] *Id.*

[199] *Id.* at 62.

over similar cases.[200] From its earliest conception, the system was designed as a judicial interpretation mechanism, through which the Court could flexibly react to ambiguities and gaps in doctrine. As the Second Five-Year Plan rather ambitiously stated, the system would allow the Court to "enrich and develop jurisprudence."[201]

After some preliminary experimentation in local courts, the Court adjusted the posting of "standard cases" on its bulletin to incorporate cases that expanded, rather than simply reiterated, judicial doctrine.[202] The slow pace of bulletin posting and uncertainties concerning the cases' binding force, however, prevented these adjustments from making any significant doctrinal mark.[203] By 2009, the Court had made little apparent progress in creating a workable "guiding cases" system.[204] The Third Five-Year Plan made no mention of the system, fueling academic speculation that the project had been put on hiatus.[205]

The project had, in fact, drawn much criticism during its four-year test run. In particular, critics worried about the project's constitutional validity. They argued that such a sweeping enhancement of the SPC's institutional competence required formal legislation by the National People's Congress.[206] And more provocatively, they contended that the system would give rise to a fresh wave of "dangerous" judicial activism: the issuance of "guiding cases" could make changes to judicial doctrine so swiftly and subtly that other party or government organs could not monitor them.[207] When the system failed to materialize by 2009, these critics wondered, with a hint of satisfaction, whether such concerns of institutional balance had led Party leaders to suspend the project.[208]

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[200] *Id.*

[201] Second Five-Year Plan, *supra* note 80, at § 13.

[202] Li, *supra* note 197, at 62–63. On the role of local courts, see *id.* at 66–67.

[203] *Id.* at 63. *See also*, Li Shichun (李仕春), Deputy Editor-in-Chief, Zhongguo Faxue (中国法学) [China Legal Science], Zhongguo Anli Zhidao Zhidu de Kunju yu Chulu (中国案例指导制度的困局与出路) [*The Current Difficulties and Potential Solutions for China's Guiding Cases System*], Zhongguo Renmin Daxue Minshang Fa Qianyan Luntan Yanjiang (中国人民大学民商法前沿论坛演讲) [Speech at the Forum on the Frontiers of Civil and Commercial Law at Renmin University of China] (Mar. 5, 2009), *available at* http://www.civillaw.com.cn/article/default.asp?id=44157 (discussing in greater detail the limited success of the SPC's experimentation with guiding cases).

[204] Li, *supra* note 197, at 63.

[205] *Id.* at 60.

[206] *Id.* at 71.

[207] *Id.* at 72–73.

[208] *Id.* at 60.

Thus, it came as a surprise to many when Zhou Yongkang, the Politburo Standing Committee member in charge of the law enforcement apparatus, gave the project a public statement of approval in late 2009, breathing fresh life into what had seemed to be a dead initiative.[209] Zhou's support did come with a catch: all three branches of the law enforcement apparatus—the judiciary, the procuratorate, and the public security bureaus—would establish a "guiding cases" system, perhaps to maintain the balance of power between them.[210] Having secured the Party's blessing, the SPC swiftly moved to formalize the system. On November 26, 2010, it issued the "Regulations Concerning the Use of Guiding Cases," more than five years since its initial conception.[211]

A "guiding case" can, at least in theory, come from any level of the judiciary. While only the adjudication committee of the SPC may formally approve "guiding cases," any lower court may recommend a case within its jurisdiction to its appellate court, until the case reaches the SPC.[212] Moreover, any adjudicatory arm of the SPC may recommend cases, with no jurisdictional limitations.[213] Perhaps as a nod to populism, the Regulations also grant any "person interested in the work of the judiciary" the right to recommend a case, but only to the court that decided it.[214]

To process the anticipated flow of case recommendations, the SPC also established a special "guiding cases office" to select and research cases for final

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[209] Sun Chunyu & Zhang Cuisong (孙春雨 & 张翠松), Tuixing Anli Zhidao Zhidu de Biyaoxing yu Kexingxing (推行案例指导制度的必要性与可行性) [*The Necessity and Plausibility of Establishing a Guiding Cases System*], Jiancha Ribao (检察日报) [PROC. DAILY], Dec. 24, 2010, at 3, *available at* http://theory.people.com.cn/GB/13576232.html (noting that Zhou's speech brought the guiding cases system to the procuratorate's attention).

[210] *Id.* (noting that Zhou's speech signaled the end of the SPC's "exclusive claim" to experimenting with guiding cases); Guanyu Anli Zhidao Gongzuo de Guiding (关于案例指导工作的规定) [Regulations on Guiding Cases] (promulgated by the Sup. People's Proc., July 30, 2010, effective July 30, 2010) (Chinalawinfo), *available at* http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=143872. The Public Security Bureau has been more low-key, but, as of early 2011, has nonetheless established a comparable apparatus. Jiang Anjie (蒋安杰), "Liang Gao" Yanjiushi Zhuren Xiangtan "Zhongguo Tese Anli Zhidao Zhidu" de Goujian ("两高"研究室主任详谈"中国特色案例指导制度"的构建) [*The Research Division Chief of the "Two Supremes" Discusses the Construction of a "Guiding Cases System with Chinese Characteristics*], Fazhi Wang (法制网) [LEGAL DAILY] (Jan. 5, 2011, 9:52 AM), http://www.legaldaily.com.cn/zfb/content/2011-01/05/content_2427555.htm (interview with Hu Yunteng, Chief of the SPC's Research Office).

[211] *Regulations on Guiding Cases*, *supra* note 196.

[212] *Id.* at § 4.

[213] *Id.*

[214] *Id.* at § 5.

approval by the adjudication committee.[215] The Regulations are unclear on whether the office may directly select a case without any external recommendation, and their wording suggests that its predominant task will simply be the processing of recommendations.[216] Approved "guiding cases" will be published via the SPC's website, its official bulletin, or the *People's Court Daily*, although the guiding cases office will gather and publish them in annotated volumes from time to time.[217] Finally, the SPC may choose to give formal "guiding case" status to any "standard case" it has previously published, without going through the recommendation procedure.[218]

A "guiding case" must be one that "has attracted broad public attention," relies upon "legal principles that are not defined in detail," is "representative" of similar cases, touches upon "difficult, complicated or unprecedented legal issues," and "can serve as a guide for other cases."[219] These criteria make it manifestly clear that the SPC sees the "guiding cases" system as an expansion of its judicial interpretation authority. All "guiding cases" are, of course, binding over lower court decisions until the approval of a new "guiding" paradigm.[220]

Despite the many similarities between a "guiding case" and a legal precedent in common law jurisdictions, the SPC and scholars closely associated with it have repeatedly emphasized that the two are "completely different": common law judges supposedly "make law," whereas "guiding cases" are simply interpretations and applications of preexisting law.[221] Whether this is a reasonable assessment would be a different paper altogether. The point here is that the SPC's lengthy pursuit of the "guiding cases" system reflects a deep-seated desire to strengthen its institutional competence, rather than ideological commitment to either populism or professionalism. SPC leadership has actually taken great care to portray the issuance of "guiding

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[215] *Id.* at § 3.

[216] *Id.*

[217] *Id.* at § 6.

[218] *Id.* at § 9.

[219] *Id.* at § 2.

[220] *Id.* at § 7; Anjie (安杰), Hu Yunteng Jiedu Guanyu Anli Zhidao Zhidu de Guiding (胡云腾解读关于案例指导制度的规定) [*Hu Yunteng Explains the Regulations on Guiding Cases*], Dongfang Fa Yan (东方法眼) [E. LEGAL PERSP.] (Jan. 11, 2011, 7:49 PM), http://www.dffy.com/fazhixinwen/lifa/201101/20110111195043.htm (clarifying that "应当参照" [*yingdang canzhao*] means "must apply"). Hu Yunteng is the current chief of the SPC's Research Office.

[221] *See, e.g.*, Zhang Zhiming (张志铭), Dui Zhongguo Jianli Anli Zhidao Zhidu de Jiben Renshi (对中国建立案例指导制度的基本认识) [*Basic Understandings on China's Establishment of the Guiding Cases System*], Fazhi Wang (法制网) [LEGAL DAILY] (Jan. 30, 2011, 4:33 PM), http://www.legaldaily.com.cn/zbzk/content/2011-01/30/content_2463586.htm?node=25496.

cases" as consistent with both ideals: the chief of the SPC Research Office, which drafted the Regulations, has recently stated that a guiding case must "receive the approval of the people," but also "promote the rule of law."[222] This seems to echo Zhou Yongkang's 2009 statement that "guiding cases" should address areas of law where "the enforcement of law is inconsistent, and where the public has expressed strong opinions."[223] As with the developments discussed in Part I, these statements reflect the ideological ambiguity of a legal system caught between two frequently contradictory models of legal reform. Still, the SPC has persisted with its pursuit of the authority to issue "guiding cases" in spite of ideological shifts or leadership changes, suggesting that something more deeply rooted in the SPC's institutional mentality is at work here.

Regardless of which ideological direction the SPC rhetorically takes, it maintains a fundamental and highly pragmatic interest in enhancing its own judicial interpretation powers. The establishment of the "guiding cases" system provides the SPC with an interpretative mechanism that operates with far greater flexibility and efficiency, but draws less public attention than formal interpretations or opinions. The system also strengthens the SPC's control over lower courts, binding the judiciary into a tighter institutional unit. Indeed, the Second Five-Year Plan explicitly states that a primary objective of the "guiding cases" system would be to "guide the adjudicatory activities of lower courts."[224] Legal reform ideologies and chief justices may come and go, but the pragmatism that leads the SPC to protect its core interests amid political volatility is probably always there.

One could even argue that the new SPC leadership has displayed a particularly sharp sense of political tact by negotiating the final arrangement to extend "guiding cases" to the procuratorate and the public security bureaus. We may never know the precise reason Zhou and other Party Leaders decided to establish the system in all three branches of the law enforcement apparatus, but that the SPC's long-stalled initiative only managed to win their approval in this particular form suggests that they might have felt uncomfortable allowing the SPC to proceed unilaterally. The final arrangement shows, therefore, some signs of a negotiated compromise, where the SPC agreed to, or perhaps even proposed, to share the expansion in institutional competence with other law enforcement branches in exchange for broader political support.

III. REINTERPRETING THE SPC'S IDEOLOGICAL AFFILIATIONS

I have argued, therefore, that the SPC's recent activities contain a strong dose of institutional pragmatism that often operates independently of, or even

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[222] An, *supra* note 220.

[223] Sun & Zhang, *supra* note 209.

[224] Second Five-Year Plan, *supra* note 80, at § 13.

contrary to, its rhetorical embrace of legal populism or professionalism. Taking this one step further, this Part suggests that the Court's recent stances towards populism and professionalism themselves derive as much from pragmatic maneuvering as they do from genuine ideological commitment: it is very much in the SPC's current self-interest to strengthen its political and popular legitimacy by advocating populism while continuing to enhance its institutional status and competence through the long-term pursuit of legal professionalism and judicial independence. Several components of its "populist" agenda, particularly its zealous promotion of mediation, actually smack more of pragmatic self-interest than genuine ideological commitment. The "tension between trends toward professionalism and populism"[225] that scholars have observed may thus reflect more the juggling of short-term versus long-term interests than real philosophical tension.

The SPC's promotion of legal populism can be viewed as the judiciary's response to a broader "ruling for the people" (执政为民) (*zhizheng weimin*) initiative that has permeated the Party-state since 2002.[226] Perhaps wary of rising levels of social unrest and sensing a greater need to enhance its public legitimacy, the state has taken great pains in recent years to present itself as responsive to the needs and opinions of the public. This trend covers broad swathes of state activity, from seeking public comment on draft legislation and regulations to systematically soliciting feedback on government activity.[227]

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[225] Liebman, *supra* note 2, at 1, 7.

[226] "Ruling for the people" was made a central Party slogan during the CCP's Sixteenth National Congress in 2002. *See* Zhang Shiyi (张士义), Guanyu Li Dang Wei Gong, Zhizheng Weimin de Wen Da (关于立党为公，执政为民的问答) [*Q&A on "Establishing the Party for Public Justice, and Ruling for the People"*], Renmin Ribao (人民日报) [PEOPLE'S DAILY], Aug. 21, 2003, at 9, *available at* http://www.people.com.cn/GB/news/2028317.html; Yao Meiping (姚眉平), "Jiedu" Zhizheng Weimin (解读"执政为民") [*Interpreting "Ruling for the People"*], Renmin Ribao (人民日报) [PEOPLE'S DAILY], Feb. 10, 2003, at 5, *available at* http://www.people.com.cn/GB/guandian/26/20030210/920349.html. It remains a central slogan today. *See* Xu Tianliang (徐天亮), Zhuoli Jiaqiang Yi Ren Wei Ben, Zhizheng Weimin Jiaoyu—Xuexi Guanche Hu Jintao Tongzhi zai Shiqi Jie Zhongyang Jiwei Liu Ci Quanhui shang de Zhongyao Jianghua (着力加强以人为本，执政为民教育—学习贯彻胡锦涛同志在十七届中央纪委六次全会上的重要讲话) [*Vigorously Strengthen Education on "Put the People First, and Rule for the People"—Studying and Implementing Hu Jintao's Important Speech at the Sixth Central Meeting of the Seventeenth Central Disciplinary Committee*], Renmin Ribao (人民日报) [PEOPLE'S DAILY], Mar. 2, 2011, at 4, *available at* http://politics.people.com.cn/GB/1026/14035892.html.

[227] *See* Jamie P. Horsley, Public Participation in the People's Republic: Developing a More Participatory Governance Model in China (Sept. 2009) (unpublished manuscript), *available at* http://www.law.yale.edu/documents/pdf/Intellectual_Life/CL-PP-PP_in_the__PRC_FINAL_91609.pdf; Wang Xixin, *The Public, Expert and Government in the Public Decision-making Process: A Case Study of China's Price-Setting Hearing System and Its Practice*, PEKING UNIV. J. LEGAL STUD., no. 1, 2008, at 71; Jamie P. Horsley, *Public Participation and the Democratization of Chinese Governance*, *in* POLITICAL CIVILIZATION

Party leaders in charge of the law enforcement system have likewise called for the judiciary to increase its responsiveness to the "people's needs."[228] The SPC's "populist turn" is, therefore, its way of participating in this general policy trend.

The actual policy measures that the SPC has taken under the veil of populism respond very much to the specific challenges it faces. For several years, one of the SPC leadership's main policy objectives has been the reduction of "litigation-related petitions" received from the "letters and visits" system (涉诉信访) (*shesu xinfang*).[229] These involve dissatisfied litigants filing a complaint with either a higher court or some other government organ, usually to appeal an unfavorable decision. The petitioning system is not part of the formal adjudication process, has few procedural obligations to the petitioner, and operates more or less as a black box that very rarely provides the petitioner with real assistance.[230] Its informal nature does, however, make it a relatively low-cost way for unhappy litigants to voice their grievances. The SPC has, therefore, often measured public dissatisfaction towards the judiciary by the volume of litigation-related petitions, even as it portrays the petitioning

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AND MODERNIZATION: THE POLITICAL CONTEXT OF CHINA'S REFORM 207 (Yang Zhong & Shipin Hua eds., 2006).

[228] Zhou Yongkang (周永康), Jianding Bu Yi Zuo Zhongguo Tese Shehui Zhuyi Shiye de Jianshezhe he Hanweizhe (坚定不移地做中国特色社会主义事业的建设者和捍卫者) [*Resolutely Be the Constructors and Protectors of Socialist Enterprise with Chinese Characteristics*], 求是 [QIU SHI], no. 15, 2008, at 3, *available at* http://news.xinhuanet.com/legal/2008-08/01/content_8888433.htm.

[229] For earlier references, see, e.g., Xiao Yang (肖扬), Zuigao Renmin Fayuan Gongzuo Baogao (2005) (最高人民法院工作报告 [2005]) [Supreme People's Court Work Report (2005)], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Apr. 10, 2005, at 236 (delivered at the 3d plenary session of the 10th National People's Congress on March 9, 2005), *available at* http://www.court.gov.cn/qwfb/gzbg/201003/t20100310_2612.htm (discussing how to "reduce litigation related *xinfang* from the roots"); Xiao Yang (肖扬), Zuigao Renmin Fayuan Gongzuo Baogao (2004) (最高人民法院工作报告 [2004]) [Supreme People's Court Work Report (2004)], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Mar. 31, 2004, at 200 (delivered at the 2d plenary session of the 10th National People's Congress on March 11, 2004), *available at* http://www.court.gov.cn/qwfb/gzbg/201003/t20100310_2628.htm. The SPC has recently ratcheted up its efforts to reduce petitions. Chen Fei & Yang Weihan (陈菲 & 杨维汉), Zuigao Fayuan Wu Xiang Jucuo Yufang he Jianshao Shesu Xinfang (最高法院五项举措预防和减少涉诉信访) [*The Supreme Court Issues Five Measures to Preempt and Reduce Litigation Related* Xinfang], Xinhua Wang (新华网) [XINHUA NET] (Feb. 8, 2011, 8:39 AM), http://news.xinhuanet.com/legal/2011-02/08/c_13722152.htm.

[230] *See* Zhang Taisu, *Why the Chinese Public Prefer Administrative Petitioning over Litigation*, SOC. STUD., no. 3, 2009, at 139; *cf.* Carl F. Minzner, Xinfang: *An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103, 176–77 (2006) (arguing that *xinfang* is, in fact, an effective system).

system as a necessary means of accessing public opinion.[231] Petitions are, of course, also irritating to courts because they often draw unwanted public attention and consume large amounts of time and energy. All things considered, the SPC has a very strong incentive to prevent litigation-related petitions to the extent possible and has clearly expressed the desire to do so, particularly recently.[232]

Since around 2008, the SPC has advocated mediation not only as a move towards legal populism, but also as an effective way to reduce litigation-related petitions.[233] The Party leadership gave this its public blessing in August 2009,[234] setting off a fresh wave of rigorous SPC advocacy.[235] The basic

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[231] *See* Zhengque Duidai Shesu Xinfang Wenti (正确对待涉诉信访问题) [*Correctly Treating the Problem of Litigation Related* Xinfang], Zuogao Renmin Fayuan Wangzhan 最高人民法院网站 [SUP. PEOPLE'S CT.] (Jan. 29, 2010, 6:24 PM), http://www.court.gov.cn/spyw/laxf/201001/t20100129_810.htm.

[232] Chen & Yang, *supra* note 229.

[233] Recent speeches by the SPC leadership suggest that it had internally encouraged the use of mediation to lower *xinfang* rates since 2008. *See* Qiu Lihua & Yang Weihan (裘立华 & 杨维汉), Minshi Anjian Shesu Xinfang Lü, Qiangzhi Zhixing Lü "Liang Xiajiang" (民事案件涉诉信访率、强制执行率"两下降") [*The* Xinfang *Rate and Coercive Enforcement Rate of Civil Cases Both Decline*], Xinhua Wang (新华网) [XINHUA NET] (June 24, 2011, 12:01 AM), http://news.xinhuanet.com/legal/2011-06/24/c_121577223.htm (reporting speech of Xi Xiaoming, SPC Vice President). Wang's first work report in early 2009, for example, discussed litigation-related *xinfang*, the "Ma Xiwu method," and mediation in immediate sequence, and made clear that the three were closely interconnected. Wang, SPC Work Report 2009, *supra* note 69. This partially explains why local courts have repeatedly made the similar statements since 2008. *See, e.g.*, Liang Zhibin (梁志斌), Shifayuan Yunyong Langfang Jingyan Jiejue Shesu Xinfang Anjian Zuotanhui (Zhailu) (市法院运用廊坊经验解决涉诉信访案件座谈会[摘录]) [*Panel on How the Municipal Court Uses the Langfang Experience to Handle Litigation-Related* Xinfang *(Excerpts)*], Langfang Fayuan Wang (廊坊法院网) [LANGFANG CT. NET] (Sept. 5, 2008, 10:59 AM), http://lfzy.chinacourt.org/public/detail.php?id=181&apage=1; Xie Kang & Liu Xing (谢康 & 刘杏), Jiangnan Qu Fayuan Goujian Shesu Xinfang Yufang Jizhi (江南区法院构建涉诉信访预防机制) [*Jiangnan District Court Establishes Mechanisms to Preempt Litigation-Related* Xinfang], Fazhi Kuaibao (法治快报) [BREAKING LEGAL NEWS], Mar. 13, 2008, *available at* http://www.pagx.cn/html/2008/3-13/20080313104206888.html.

[234] Liu Juntao (刘军涛), Zhongyang Zhengfawei jiu Jiaqiang he Gaijin Shefa Shesu Xinfang Gongzuo Yijian Da Jizhe Wen (中央政法委就加强和改进涉法涉诉信访工作意见答记者问) [*The Central Committee on Political and Judicial Affairs Responds to Reporters' Questions on Its Opinions on Strengthening and Reforming the Processing of Litigation-Related* Xinfang], Renmin Wang (人民网) [PEOPLE'S NET] (Aug. 18, 2009, 5:19 PM), http://politics.people.com.cn/GB/1026/9884084.html. This would hardly be the first time that the Party leadership approved reform measures first proposed within the judiciary. The negotiations over guiding cases discussed at *supra* pp. 42–44 are another prominent example.

rationale seems to be that mediated results are less likely to provoke petitions because they require the consent of both sides.[236] Whether this is true in practice is unclear: the percentage of cases mediated, as discussed above, has leapt to over 60% after 2006,[237] but the volume of litigation-related petitions still increased in most years, with the exception of a sharp drop in 2006–2007 and a more moderate one in 2010.[238] Nonetheless, the SPC continues to consider mediation an effective countermeasure against popular complaints.

The SPC's recent establishment of a national performance evaluation system adds a fresh layer of institutional pressure to mediate. Although local courts have experimented with such measures since at least 2003, this would be the first time that that the SPC has formally sanctioned them—in the past, the SPC had largely cautioned against abuse of performance indicators.[239] As with the application of summary procedure, the indicator system sees a higher rate of mediation as an unqualified positive that directly reflects the quality of a judge's work. [240]

The inconsistencies discussed above between the use of target performance levels and *both* legal professionalism and populism also apply to the use of mediation statistics.[241] By giving judges a strong personal interest to apply mediation as often as possible, the evaluation system not only runs a large risk of obstructing the accurate determination of facts and application of law, but also substantially increases the likelihood that judges will force procedural choices on litigants. Thus the SPC's promotion of mediation,

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[235] Most recently, see Wujian (武健), Zuigao Renmin Fayuan jiu Shesu Xinfang Gongzuo Xiafa Xilie Wenjian (最高人民法院就涉诉信访工作下发系列文件) [*The Supreme Court Issues a Series of Documents on Addressing Litigation-Related* Xinfang], Renmin Fayuan Bao (人民法院报) [PEOPLE'S CT. DAILY], May 16, 2011, at 1, *available at* http://rmfyb.chinacourt.org/paper/html/2011-05/16/content_27313.htm.

[236] *Id.*; Chen Fei (陈菲), Wang Shengjun: Zhuzhong Yunyong Tiaojie Shouduan Jiejue Susong Nan, Zhixing Nan Wenti (王胜俊: 注重运用调解手段解决诉讼难，执行难问题) [*Wang Shengjun: Emphasize the Use of Mediation to Resolve Litigation and Enforcement Difficulties*], Xinhua Wang (新华网) [XINHUA NET] (July 28, 2009, 9:43 PM), http://news.xinhuanet.com/legal/2009-07/28/content_11788407.htm. *See also* Minzner, *supra* note 4, at 42–43 (critically assessing such claims).

[237] *See supra* note 73.

[238] For the decreases in 2006 and 2010, see Xiao, SPC Work Report 2007, *supra* note 117; and Wang, SPC Work Report 2011, *supra* note 73. *See* Zhang, *supra* note 230, at 147 for pre-2005 trends, and Liu Hualei (刘化雷), Shefa Shesu Xinfang Wenti Yanjiu (涉法涉诉信访问题研究) [*Research on Law-Related or Litigation-Related* Xinfang], Jishu yu Shichang (技术与市场) [TECH. & MARKET], no. 12, Dec. 2009 at 26, *available at* http://www.lawpass.cn/sifa/1049.html, for 2007–2009 trends.

[239] *See* discussion *supra* notes 127–128.

[240] *See* discussion *supra* notes 121–126.

[241] *See* discussion *supra* pp. 31–32.

arguably the poster-child of Chinese judicial populism, ironically contains institutional mechanisms that violate populist ideals. This calls into question, once again, the depth and "purity" of the SPC's commitment to legal populism.

But these mechanisms do fit into a pragmatic reading of SPC intent. As noted above, the SPC seems to believe that, because mediated results represent mutual compromises between the litigants, they can create significant psychological and social pressure on them to abide by it or, at least, refrain from bring related disputes to government authorities, thereby lowering the likelihood of a litigation-related petition.[242]

Some scholars would argue this is only part of the cost-benefit calculation: the potential increase in coerced mediation might trigger significant public dissatisfaction over the long run.[243] Still, so far there is no indication that the SPC shares these concerns. Moreover, even coerced mediation can theoretically preempt litigation-related petitions. To litigants, it may seem harder to argue that "the judge forced me into this compromise" than to argue that an adjudicated decision was wrong, especially if the presiding judge had some sense of tact. The greater perceived difficulty of proving their case might deter these unsatisfied litigants against further petitioning. An overemphasis on mediation could, therefore, lead to lower petitioning rates even without any corresponding increase in overall public satisfaction.

Whether this kind of deterrence tactic benefits the Party-state as a whole is unclear. It is worth noting that the Party leadership's 2009 approval was devoid of technical details and therefore has not officially approved the use of target performance levels to semi-coercively boost mediation.[244] Unexpressed discontent may well be more dangerous to its sociopolitical footing than expressed discontent.[245] The SPC leadership, on the other hand, would reap considerable benefits from a short-term drop in litigation-related petitions, which strengthens its political reputation and standing.[246] This suggests that the SPC's sanctioning of mediation "target levels" is more closely attuned to its institutional self-interest than to the general interests of the Party-state, further emphasizing the need to recognize the SPC's "institutional agency" in shaping judicial policy.

The SPC's promotion of mediation is less blatantly utilitarian than some of its other populist measures. In late 2010, the SPC commissioned the creation of

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[242] *See supra* note 236.

[243] Minzner, *supra* note 4, at 42–43.

[244] Liu, *supra* note 234.

[245] *Id.* at 41–42.

[246] Insofar as such petitions are a measure of public unhappiness with judicial outcomes—something the SPC seems to believe in, *supra* note 231, any decrease in their volume would naturally support the argument that the SPC is succeeding in its management of public opinion, an argument the SPC leadership has never failed to trumpet whenever *xinfang* rates drop. *See* Qiu & Yang, *supra* note 233; Xiao, SPC Work Report 2007, *supra* note 117; Wang, SPC Work Report 2011, *supra* note 73.

a cartoon mascot for the Chinese judiciary,[247] which serves no conceivable purpose except the "softening" of the SPC's public image.[248] At roughly the same time, the SPC also announced the completion of a propaganda documentary called *The People's Judges*.[249] While these measures are certainly "populist," the fact that the highest court in the nation would endorse these somewhat undignified attempts to win public favor seems to suggest that the SPC's embrace of populism derives not only from ideological agreement, but also from strong pragmatic motivations.

There are limitations, however, to the pragmatic benefits of populism. Whatever short-term benefits it may provide the SPC, it cannot override the SPC's longer-term interest in promoting legal professionalism. Ultimately, the main institutional difference between the judiciary and other government organs is that it possesses the power of adjudication. Many government organs can mediate a dispute—some, in fact, arguably do it better than the judiciary[250]—but only the courts can regularly adjudicate. Whether the power of adjudication is socially or politically significant depends, however, on whether there is general adherence to legal norms, both substantive and procedural. In other words, it depends on whether there is at least a "thin" version of the rule of law.[251] Thus, it is in the judiciary's institutional interest to enforce its decisions rigorously and, moreover, to encourage other government organs to obey legal norms. And because the judiciary's normative or moral standing to take such action depends largely on its ability to apply the law fairly and consistently, the judiciary also has a considerable incentive to demand higher professional standards of its personnel. This does not mean that the judiciary will always prefer the legal status quo: historically, courts have often found it either desirable or necessary to push for significant legal

[247] Fayuan Katong Xingxiang Shouci he Gongzhong Jianmian bing Zhengqiu Yijian (法院卡通形象首次和公众见面并征求意见) [*The Judiciary's Mascot Is Revealed to the Public for the First Time and Seeks Comments*], Zuigao Renmin Fayuan Wangzhan (最高人民法院网站) [SUP. PEOPLE'S CT.] (Dec. 4, 2010, 9:15 AM), http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201012/t20101204_11804.htm.

[248] The SPC at least does not pretend otherwise. *Id.*

[249] Shoubu "Renmin Faguan" Xingxiang Xuanchuanpian Shouying (首部《人民法官》形象宣传片首映) [*The Premiere of "The People's Judges," the Judiciary's First Public Image Advocacy Film*], Zuigao Renmin Fayuan Wangzhan (最高人民法院网站) [SUP. PEOPLE'S CT.] (Dec. 3, 2010), http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201012/t20101204_11805.htm.

[250] The main venues for mediation are supposedly specialized "people mediation committees," not courts. *See* Vai Io Lo, *Resolution of Civil Disputes in China*, 18 UCLA PAC. BASIN L.J. 117 (2001).

[251] For the definition of "thin" and "thick" versions of the rule of law, see *supra* note 37.

change.[252] Nonetheless, the judiciary's self-interest urges against "arbitrary" or "unjustifiable" breaches of established law. What specifically constitutes an "arbitrary" or "unjustifiable" breach depends on one's theory of jurisprudence and legal change,[253] but no matter which theory one abides by, the observation that courts have a vested interest in promoting legal professionalism, both personal and institutional, remains basically valid.

The judiciary does, of course, operate within strong institutional and social constraints that frequently demand concessions from its general interest in professionalism.[254] Yet, if the SPC wishes to reliably enhance its institutional competence and importance relative to other state and party organs, it will inevitably need to boost the sociopolitical significance of the one function that is largely unique to it. If we see the SPC as an institutional "rational actor," we

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[252] The empirical narrative provided in *supra* Part I is, to at least some significant extent, a narrative of doctrinal change initiated by and implemented through the judiciary. *See* particularly the series of pro-professionalism changes discussed at *supra* pp. 12–16.

[253] It suffices to note that any law student who has taken an American legal history course will feel quite at home debating the merits of "formalist" versus "progressive" approaches towards legal change, a debate that has taken some new turns in recent years. *See* DAVID M. RABBAN, LAW'S HISTORY: LATE NINETEENTH-CENTURY AMERICAN LEGAL SCHOLARSHIP (forthcoming) (refuting the notion that legal thought during the so-called "formalist" era was preoccupied with abstract conceptions); BRIAN TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE (2010) (arguing that formalist portrayals of the era have limited explanatory power); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 33–64 (1992) (presenting a more traditional view of the formalist/progressive dichotomy). Despite drastically different sociopolitical settings and legal traditions, the same basic questions apply to Chinese legal reform: Who is allowed to instigate legal change, and under what circumstances? More specifically, are courts allowed to react independently to socioeconomic change by spearheading doctrinal reform? These questions inevitably lead to a broader debate on what, exactly, Chinese courts are designed to do, which any scholar in the Chinese law field is highly familiar with. For a brief summary of the various positions in this debate, see Donald C. Clarke, *China's Jasmine Crackdown and the Legal System*, CHINESE L. PROF BLOG (May 26, 2011), http://lawprofessors.typepad.com/china_law_prof_blog/2011/05/chinas-jasmine-crackdown-and-the-legal-system.html. *See also* Donald Clarke, *Empirical Research into the Chinese Judicial System*, *in* BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 164 (Erik Jensen & Thomas Heller eds., 2003) ("[P]erhaps Chinese courts are not designed to do, and should not do, the things Western courts do."); PEERENBOOM, *supra* note 2 (presenting a more conventional "rule of law"-based evaluation of the Chinese judiciary). Such issues have more than just academic value, as the debate over the appropriate constitutional and legislative position of the SPC continues to be of central importance in the Chinese legal world—unsurprisingly, given the SPC's broad authority to issue interpretations and regulations that very much resemble legislation. *See, e.g.*, Li, *supra* note 197 (criticizing the SPC for overstepping its constitutional authority in experimenting with "guiding cases"); Zhang, *supra* note 221 (arguing that the issuance of guiding cases does not constitute legislation).

[254] *See* discussion *supra* pp. 4–5, 22–23.

would expect it to maintain long-term advocacy of professionalization and judicial independence, while occasionally diverging from that basic stance to accommodate political necessity, public unhappiness, financial needs, or other pragmatic concerns. This is precisely what we see in recent SPC activity: although the SPC has certainly issued a substantial amount of populist rhetoric, the specific policies it has created under that rhetorical umbrella often seem unapologetically utilitarian, designed to handle specific sociopolitical needs.[255] At the same time, a fair number of the SPC's most important policy initiatives have little to do with either populism or professionalism, but simply attempt to enhance its financial health and institutional power.[256] Beneath all this pragmatic maneuvering, the SPC continues to promote professionalism and the rule of law, placing them side-by-side with its populist rhetoric and apparently ignoring any theoretical inconsistencies.[257]

This institutional "rational actor" model of SPC behavior also works reasonably well when applied to the Xiao Yang era. A number of legal scholars in Mainland China have, in fact, accused the SPC of power-hungry judicial activism during the early 2000s, particularly through the ill-fated *Qi Yuling* decision.[258] Where western scholars have generally seen positive developments in judicial independence and professionalism,[259] they saw an ambitious SPC attempting to increase its own institutional authority relative to other state and Party organs. More recently, however, political pressures—perhaps the Party's response to sprouts of "judicial activism"—and signs of social discontent have heightened the SPC's sense of vulnerability. It therefore entered into a period of more openly pragmatic maneuvering, accentuated by dashes of populism and a stronger emphasis on "judicial efficiency." Essentially, the SPC was willing to provide strong support for professionalism initiatives as long as the sociopolitical atmosphere remained largely benign. Once external pressures began to intensify, it swiftly adapted through a variety of measures that often escaped neat ideological categorization, while never quite giving up on the promotion of legal professionalism.

The interpretation of the SPC as a pure institutional "rational actor" is a "strong" version of the institutional pragmatism argument this Article has attempted to make. It would predict that pragmatic concerns of self-interest almost completely drown out other institutional motivations. A weaker but probably more realistic version of the argument would place institutional pragmatism alongside other, more ideological motivations. There is certainly

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[255] *See* discussion *supra* pp. 49–54 (unclear about the page perimeters you're referring to).

[256] *See* discussion *supra* Part II.

[257] *See* discussion *supra* p.23 (unclear about the page perimeters you're referring to).

[258] *See* discussion surrounding *supra* notes 55–57.

[259] *See* discussion surrounding *supra* notes 6–7.

no reason to doubt that many SPC judges have internalized either professionalist or populist ideals or, in some logically murky fashion, both. What this Article points out, however, is that numerous SPC activities bear no clear relationship to either ideal and, in fact, contradict both. Instead, institutional self-interest is most likely the key motivation for SPC policy-making. Moreover, nearly every major SPC policy trend of the past eight or nine years has made significant pragmatic sense for the Court. Other more ideological factors may well have enhanced or limited certain policy trends—perhaps, for example, the SPC might not have marched head-first into *Qi Yuling* if its leadership had not genuinely believed in constitutional rule-of-law ideals—but one can reasonably suggest, at least, that institutional pragmatism has been a *necessary*, if not entirely sufficient, condition for major SPC activity.

Compared, on the other hand, to studies that see the SPC as a loyal foot soldier who simply carries out the Party-state's policy directives, the arguments made here place far greater emphasis on the SPC's ability to shape judicial policy based on its own interests, rather than those of the general Party-state. The two sets of interests are often divergent: the Party-state has no clear incentive to promote summary procedure or demand a simplified marriage law—quite the opposite, the SPC's recent activity in these areas may create significant socioeconomic inefficiencies that could eventually damage the social stability that the Party-state so prizes. The Party-state also seemed reluctant to sign onto the SPC's "guiding cases" system, perhaps wary of potential judicial activism.[260] Even the SPC's promotion of mediation arguably promotes the SPC's short-term interests at significant long-term cost to the Party-state. Finally, the SPC's dogged promotion of legal professionalism, however tempered by populist rhetoric, suggests a clear awareness of where its fundamental institutional interests lie, regardless of the external sociopolitical atmosphere.

CONCLUSION

What institutional motivations drive judicial activity? What constitutes a conventional answer varies heavily with discipline and field. American scholars may, for example, hesitate to attach a self-interested motive to developments in recent American constitutional law. Constitutional scholars have certainly lodged accusations of blatant judicial activism against many justices, but such accusations nonetheless tend to be about ideology, not self-interest.[261] Some scholars consider, for example, the Rehnquist Court "judicially activist" because it went against established precedent to promote a conservative legal ideology, not because it consciously attempted to expand

[260] *See* discussion surrounding *supra* notes 208–210

[261] *See* discussion *supra* note 31.

the Supreme Court's own institutional authority.[262] Legal theories regularly consider whether justices act upon ideological bias, be it racism, sexism, or any number of "isms,"[263] but somewhat rarer—with, of course, important exceptions[264]—is the argument that they issued a decision primarily to shore up the judiciary's financial security or enhance its position relative to other branches of government. In fact, by regularly speaking of the Supreme Court's "jurisprudence," scholars often seem to assume that the Supreme Court acts mainly out of genuine intellectual or ideological affiliations.[265] This is unsurprising: after the turmoil of the 1930s,[266] the Supreme Court has often seemed so secure in its institutional position and embedded within a socio-politically legitimate tradition of government that it has little need to promote its institutional self-interest via Machiavellian maneuvers.[267] Contemporary Western European judiciaries are often similarly situated.[268]

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[262] *E.g.*, THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 7 (2004); THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., 2003) (critically assessing the Rehnquist Court's positions on civil rights and liberties, federalism, and institutional powers).

[263] *E.g.*, Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995) (arguing that ideological values often influence Supreme Court voting); Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1388–89 (1988) (describing charges of racism against the Supreme Court); Ann E. Freedman, *Sex Equality, Sex Differences and the Supreme Court*, 92 YALE L.J. 913 (1983) (discussing sexual biases in Supreme Court decision-making). Often the charge is one of more general conservatism or liberalism. *E.g.*, THE REHNQUIST COURT, *supra* note 262; C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355 (1981).

[264] *See supra* note 32. More recently, scholars have debated whether a more assertive executive might intimidate the Supreme Court into a more permissive jurisprudence of executive power. *See* ACKERMAN, *supra* note 32, at 68–69 (arguing that this is an imminent danger); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1701–06 (2011) (reviewing Ackerman's arguments and arguing against them); Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 785–86 (2011) (noting that, in recent cases concerning war-on-terror decisions, "the Court has swept aside vigorous arguments by the executive that it refrain from engagement on abstention or political question grounds," and that "the Court has scarcely noted any doctrinal tradition of interpretive 'deference' on the meaning of the laws").

[265] *See* discussion *supra* note 31.

[266] On Court Packing struggles during the New Deal, see, e.g., William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L.J. 673; LEONARD BAKER, *BACK TO BACK*: THE *DUEL* BETWEEN FDR AND THE SUPREME COURT (1967).

[267] This is a prevalent but perhaps overly optimistic assumption. ACKERMAN, *supra* note 32, at 1. The secure life tenure of Supreme Court justices has been a source of concern for some constitutional law scholars, most famously ALEXANDER BICKEL, THE LEAST

As we move away from supposedly strong, well-entrenched judiciaries in governments that face no significant legitimacy problem, however, this assumption swiftly ceases to apply. Perhaps the easiest way to see this is by going back in time. For instance, legal historians have relatively few qualms about portraying common law and equity judges in early modern England—or perhaps, more generally, royal and ecclesiastical courts across Western Europe—as engaging in "judicial competition" to strengthen their institutional authority and influence.[269] While they would also point out the more intellectual considerations underlying the evolution of the writ of covenant or the expansion of King's Bench jurisdiction via legal fictions, the argument that pragmatic consideration of institutional self-interest was prominent in these developments is well-accepted.[270] Going further back in time, major theories of Roman law likewise acknowledge that Roman jurists were predominantly attracted by the personal prestige that legal service could bring and were thus less interested in the rational development of legal doctrine than in pragmatic problem solving.[271]

Scholars with extensive backgrounds in economics tend to apply "rational actor" assumptions particularly thoroughly. The famous "legal origins" thesis, for example, explicitly makes the assumption that late medieval judges and juries in England and France alike decided whether to convict a defendant by comparing the utility they would gain from a conviction with the retributive damage they could expect from the defendant's relatives or social contacts.[272] Similarly utilitarian views of institutional and personal decision-making are quite common in political economy theories of legal or institutional history,

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DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986)—a problem that many Chinese jurists would probably love to have. Such concerns remain contentious today. *See, e.g.*, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL'Y 770 (2006); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993). *But see supra* notes 32, 33 and 264, which discuss important strands of legal scholarship that sees the Supreme Court as susceptible to political pressures and considerations even today.

[268] The German Federal Constitutional Court, for example, is often considered the most powerful and respected constitutional court in the world. *See* GEORGE VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY (2005). For a more general review of the rise of constitutionalism in recent decades, particularly in the Western world, see Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

[269] *See* discussion *supra* note 29.

[270] *Id.*

[271] WATSON, *supra* note 29.

[272] Edward L. *Glaeser & Andrei Shleifer, Legal Origins*, 107 Q. J. ECON. 1193 (2002).

notably in more recent legal scholarship on "jurisdictional competition."[273] The basic justification for this seems to be that legal personnel and institutions in pre-modern or early modern societies enjoyed relatively weak security and influence within the broader state apparatus, which also faced significant political, military and legal challenges.[274] These judiciaries faced not only great uncertainties in external sociopolitical circumstances, but also considerable ambiguity in their self-identity. It seems natural, therefore, to assume that their decision-making incorporated strong elements of pragmatic self-interest.

This assumption continues to apply if we replace the temporal modifications with geographic ones—that is, if we study contemporary judiciaries in authoritarian, developing nations, especially those that have yet to establish a strong, well-entrenched judiciary and legal profession and face some measure of potential political instability. If we assume that late medieval European jurists were willing to alter their judicial decisions based on concerns of personal safety or political standing, then, by the same logic, it seems reasonable to suspect that comparably vulnerable jurists in a young, modern authoritarian state may also be willing to make similar concessions. Here, however, the legal literature is quite underdeveloped. Scholars have made significant progress in studying the judiciaries of authoritarian developing nations, but they have more often focused on identifying the functions that these judiciaries carry out for their respective states, rather than studying them as entities capable of acting in institutional self-interest.[275] This is perhaps a natural consequence of the subject matter: given the authoritarian nature of the state, one may expect the judiciary to have relatively little room for self-interested maneuvering.

As we have attempted to demonstrate for the Chinese judiciary, however, these expectations sometimes miss the mark and may miss more and more as governments stabilize and societies grow.[276] One hypothetical but fairly plausible chain of events is as follows: as societies grow in economic and political complexity, laws governing sociopolitical behavior will likewise grow in complexity. By no means will they inevitably converge upon Western legal

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[273] *See, e.g.*, Klerman, *supra* note 29; Zywicki, *supra* note 29.

[274] These are particularly evident in Glaeser & Shleifer, *supra* note 272. *See also* the discussion *supra* note 33.

[275] *See, e.g.*, the various examples cited in *supra* notes 3, 15. For a broader comparative perspective on judiciaries in authoritarian regimes, see Tom Ginsburg & Tamir Moustafa, *Introduction*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1 (Tom Ginsburg & Tamir Moustafa eds., 2008), and the other essays in that volume. While certainly a significant academic achievement, apart from the final essay, Martin Shapiro, *Courts in Authoritarian Regimes*, *in id.* at 326, which lists some broad theoretical observations on judicial behavior and motivation, the other, more empirical, essays in the volume focus, perhaps justifiably, on the question of when and why authoritarian regimes grant substantive powers to courts—a question that may precede the examination of the judiciaries' own institutional motivations in logical order.

[276] *See* discussion surrounding *supra* notes 16–18, 94, 95.

models,[277] but institutions that specialize in legal affairs will still grow in authority and independence as the legal system expands and professional legal training becomes more valuable. As legal professionals come to enjoy greater sociopolitical influence, they will then push for greater expansion and professionalization of the legal system, partly because their training encourages them to internalize such norms, but also because it is in their own interest to do so—as pre-modern European jurists have found, time and time again.[278]

There is, therefore, good reason to study judiciaries in authoritarian states as institutional "rational actors" that are capable of pragmatic maneuvering similar to what we regularly attribute to pre-modern or early modern European judiciaries. No one would deny that, compared to its democratic peers, an authoritarian state probably has greater incentive and ability to keep its judiciary under a tighter leash. But the appropriate mental image is at least that of a leash, and not a series of puppet strings that control every notable judicial development.[279]

I have argued here that institutional pragmatism is the best explanation for a series of recent SPC activities, ranging from the enhancement of "judicial efficiency" to the establishment of "guiding cases." It also does a surprisingly good job of explaining both the SPC's well-publicized promotion of legal populism and, perhaps ironically, its ongoing commitment to further professionalization. Furthermore, institutional pragmatism may also help us predict where Chinese legal reform is headed. Assuming for the moment that greater legal professionalization is, in fact, a desirable objective,[280] perhaps there is greater reason for optimism under a theory of institutional pragmatism than if the SPC has actually internalized "legal populism" as a long-term ideal for judicial reform, or that it is simply a largely "mindless" extension of the Party-state. This Article has presented the SPC as an entity both willing and capable of pursuing its institutional self-interest, but it has also argued that the SPC's self-interest, over the long run, is congruent with legal professionalism. To the extent we must recognize that the SPC has only limited maneuvering room within the constraints of Party-state policy—and

[277] Within the Chinese context, see particularly Clarke, *China's Jasmine Crackdown and the Legal System*, *supra* note 253; and Clarke, *Empirical Research into the Chinese Judicial System*, *supra* note 253. For a broader comparative and theoretical perspective, see Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003) (discussing the conditions under which cross-nation and cross-culture legal transplants are likely, plausible and successful).

[278] *See* discussion *supra* note 29.

[279] *See* Ginsburg & Moustafa, *supra* note 275, at 2 (noting that more recent scholarship "cuts against" the traditional presumption that courts in authoritarian regimes were "mere pawns").

[280] At least in economic dimensions, this is not an absolute certainty. World Bank studies suggest, for example, that the more formalistic a judicial system is, the less economically efficient it becomes. Danjkov et al., *supra* note 134.

that the Party-state's policy-making rests upon far more complex considerations of social stability, economic development, and political legitimacy—these arguments suggest that at least one important institutional player will consistently possess a strong incentive to promote legal professionalization.

Barring drastic and unforeseeable sociopolitical shocks, it seems highly unlikely that the SPC will completely abandon its basic commitment to further professionalization. At the same time, the SPC probably will not hesitate to temporarily shelve that commitment for short-term institutional gain. Recent examples include the promotion of populism and the decidedly utilitarian pursuit of "judicial efficiency." This might cause judicial reform activists a fair amount of frustration and anxiety, but it probably does not foreshadow long-term regression away from rule of law ideals. The SPC's institutional self-interest is a reliable and reasonably powerful ally, and—over the long run, at least—the activists actually have it on their side.